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EDITOR'S NOTE

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No. 86-957-CFX
Status: GRANTED

Title: John A. Liljeberg, Jr., Petitioner
v.
Health Services Acquisition Corp.

Docketed:
December 8, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Farr III,H. Bartow

Counsel for respondent: Lucas Jr.,William M.

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1986	G	Petition for writ of certiorari filed.
3	Dec 10 1986		Order extending time to file response to petition until January 31, 1987.
4	Jan 30 1987		Brief of respondent Health Services Acquisition Corp. in opposition filed.
5	Feb 4 1987		DISTRIBUTED. February 20, 1987
6	Feb 11 1987	X	Reply brief of petitioner John Liljeberg filed.
7	Feb 20 1987		Relisted by the Chief Justice for February 27, 1987
8	Feb 23 1987		REDISTRIBUTED. February 27, 1987
9	Feb 27 1987		Relisted by the Chief Justice for March 6, 1987
10	Mar 2 1987		REDISTRIBUTED. March 6, 1987
11	Mar 9 1987		Petition GRANTED.
			**********
13	Apr 2 1987		Order extending time to file brief of petitioner on the merits until May 23, 1987.
14	May 8 1987		Record filed.
15	May 8 1987		Certified copy of original record and procee'ings, 6 volumes, received.
19	May 21 1987		Order extending time to file brief of respondent on the merits until July 25, 1987.
16	May 22 1987		Joint appendix filed.
17	May 22 1987		Brief of petitioner John Liljeberg filed.
23	Jul 22 1987	X	Brief amici curiae of NEC Corporation, et al. filed.
20	Jul 23 1987		Brief amicus curiae of Kenneth Davis, Jr. filed.
21	Jul 24 1987		Brief of respondent Health Services Acquisition filed.
22	Jul 27 1987		CIRCULATED.
24	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 9, 1987. (3rd case).
25	Nov 27 1987	X	Reply brief of petitioner John Liljeberg filed.
26	Dec 9 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-957

No. _____

Supreme Court, U.S.
FILED
DEC 8 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,
Petitioner

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Approximately a year and one-half after judgment was entered against it, respondent in this case sought to force recusal of the trial judge and to vacate the judgment pursuant to 28 U.S.C. § 455(a). The Fifth Circuit, reversing the district court, invalidated the judgment on the ground that the trial judge had previously possessed "constructive knowledge" of facts sufficient to create an appearance of impropriety. In thus granting retroactive relief, the court of appeals placed itself in direct conflict with the Seventh Circuit, which has held that "[i]n cases decided under § 455(a), disqualification runs from the time the motion [to recuse] was made or granted." *United States v. Murphy*, 768 F.2d 1518, 1539 (1985), *cert. denied*, 106 S. Ct. 1188 (1986).

The questions presented are:

1. Whether a court, granting a motion to rescuse under 28 U.S.C. § 455(a) based solely upon an appearance of impropriety, may set aside acts taken prior to the filing of the motion.

2. Whether, under 28 U.S.C. § 455(a), a court may entertain a motion to recuse after the judgment has become final.

3. Whether, under 28 U.S.C. § 455(a), a judge is required to recuse himself on the basis of facts about which he has no actual knowledge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ——

JOHN A. LILJEBERG, JR.,
Petitioner

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, John A. Liljeberg, Jr. ("Liljeberg"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 796 F.2d 796, and is reprinted in the appendix to this petition at Pet. App. 1a-13a. The opinion of the United States District Court for the Eastern District of Louisiana is unpublished and is reprinted in the appendix hereto at Pet. App. 14a-35a. Earlier opinions of the court of appeals and district court, all unpublished, are reprinted in the appendix hereto at Pet. App. 38a-93a.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1986. A Petition for Rehearing before the panel and a Suggestion for Rehearing *en banc* were denied on September 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved in this case, 28 U.S.C. § 455, is set forth in the appendix to this petition at Pet. App. 94a-96a.

STATEMENT

The petition in this case arises out of a motion, filed by respondent long after final judgment against it, to disqualify the trial judge and vacate the judgment on grounds of an appearance of impropriety. See 28 U.S.C. § 455(a). The district court denied the motion. The court of appeals reversed, ordering a new trial.

The proceedings, though extended, are relatively uncomplicated. The first stage of events began on November 30, 1981, with a lawsuit by respondent, Health Services Acquisition Corp. (HSAC), against petitioner Liljeberg to determine ownership of a corporation known as "St. Jude Hospital of Kenner, La., Inc." The parties acknowledged that the State of Louisiana had issued a certificate of approval, pursuant to 42 U.S.C. § 1320 a-1, in the name of St. Jude, for construction of a hospital facility. Pet. App. 15a.

A trial on the merits was held on January 21 and 22, 1982, before the Honorable Robert F. Collins, United States District Judge for the Eastern District of Louisiana. At the conclusion of the trial, Judge Collins indicated from the bench that he expected to rule for petitioner. On March 12, 1982, Judge Collins issued a judgment and opinion dismissing HSAC's suit and declaring

Liljeberg the owner of St. Jude. Judgment was entered on March 16, 1982. Pet. App. 79a-93a.

The judgment of the district court was affirmed by the court of appeals on October 18, 1982. *Health Services Acquisition Corp. v. Liljeberg*, 691 F.2d 500 (5th Cir. 1982) (*Liljeberg I*) (unpublished opinion). *See* Pet. App. 57a-78a. Respondent did not seek further review.

The suit, now ostensibly over, lay dormant until August 24, 1983, when respondent filed a motion to vacate the judgment and to order a new trial. The asserted grounds for the motion were that Loyola University ("Loyola") had a putative interest in the litigation and that Judge Collins had been a member of Loyola's Board of Trustees.[1] Finding that "both subjective and objective impartiality [had been] assured," Pet. App. 50a, Judge Collins denied the motion. *See* Pet. App. 48a-50a.[2]

The Fifth Circuit reversed. *Health Services Acquisition Corp. v. Liljeberg*, No. 83-3657, slip op. (5th Cir. 1984) (*Liljeberg II*) (unpublished opinion). *See* Pet. App. 40a-47a. In so doing, it accepted the statement of Judge Collins that, at the time of trial, he "had no knowledge" of Loyola's real estate transactions. Pet. App. 45a. It concluded, however, that the assertion did "not spell out with great enough specificity the temporal relation between his learning of Loyola's interest and the final rendering of judgment." Pet. App. 45a. It thus remanded the case for further proceedings before a different judge "so that the court may determine precisely

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[1] Over a period of several years, Loyola had conducted discussions with various organizations and individuals, including petitioner and respondent, regarding the construction of a hospital on property owned by the University. Reports on those discussions were made from time to time at Board meetings, some of which Judge Collins had attended. See Pet. App. 17a-25a; page 4 *infra*.

[2] Respondent had filed a similar motion in a related suit then pending before Judge Collins. That motion was also denied. See Pet. App. 51a-56a.

when Judge Collins learned of Loyola's interest." Pet. App. 45a-46a.

On remand, the Honorable Charles Schwartz, United States District Judge for the Eastern District of Louisiana, found that Judge Collins first knew of Loyola's interest in the case on March 24, 1982, twelve days after he signed and rendered his judgment and eight days after the judgment was entered. Although matters relating to Loyola's real estate interests had been discussed at board meetings prior to that time—and Judge Collins had been marked as present at several of those meetings—the court found that, "despite all the prior discussions at board meetings and communications, [Judge Collins] did not recollect either Loyola's involvement or that the University could be affected by his decision." Pet. App. 25a. The court further found that, by the time that Judge Collins obtained actual knowledge (i.e., March 24, 1982), the interest of Loyola in the lawsuit had ceased to exist. Pet. App. 28a.

The court then went on to address the question whether Judge Collins had possessed "constructive knowledge" of Loyola's interest at the time of trial. It concluded that he had. It based its finding on the fact "that there was available to the Judge information regarding" the discussions with possible developers, including petitioner, and regarding the "import of the ownership of the certificate [of approval] to Loyola." Pet. App. 30a. Because the court did not view "the Fifth Circuit's mandate as requiring recusal upon such conditions," it held that "recusal is not dictated by such constructive knowledge." Pet. App. 33a.[3]

The court of appeals again reversed, holding that "constructive knowledge" is sufficient for recusal under Section 455.[4] Although the court recognized that Section 455(b)(4) "requires that a judge *know* that he has an interest in the litigation before recusal is required," Pet. App. 11a (emphasis in original), it found no such condition in Section 455(a). In its view, that section requires recusal "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Pet. App. 11a.[5]

Although the court recognized that its rule could lead to serious consequences, it expressly declined to follow the rule of the Seventh Circuit that "disqualification under Section 455(a) runs only from the time that a recusal motion is made or granted." Pet. App. 11a-12a, citing *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986). The court reaffirmed that, in the Fifth Circuit, "a party may move to vacate a judgment based solely on an appearance of partiality existing at the time that the judgment was rendered." Pet. App. 12a.

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[3] In light of this holding, the court found no occasion to resolve the issue whether recusal under 28 U.S.C. § 455 may be made retroactive or operates prospectively only. See Pet. App. 33a n.15.

[4] The court also held that Judge Collins should have recused himself immediately upon gaining actual knowledge of Loyola's interest on March 24, 1982, eight days after judgment had been entered. However, noting that recusal under such circumstances is normally prospective from the time of knowledge, the court observed that "the only effect of Judge Collins' recusal on March 24 would have been to allow HSAC to make any post-trial motions to a different judge, yet HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make." Pet. App. 8a-9a. Given its holding regarding "constructive knowledge," the court of appeals found it "unnecessary to decide what the proper appellate remedy for this error would be." Pet. App. 9a.

[5] Following its earlier decision in *Hall v. Small Business Administration*, 695 F.2d 175 (1983), the court of appeals limited the circumstances to be known to "objectively ascertainable fact[s]." Pet. App. 11a. It held that a judge's "forgetfulness" was not such a fact. Pet. App. 11a.

REASONS FOR GRANTING THE WRIT

This case presents important and troubling questions about the application of 28 U.S.C. § 455(a), which provides for disqualification of judges "in any proceeding in which [their] impartiality might reasonably be questioned." By ordering retroactive disqualification here, based on a motion filed more than 18 months after judgment had been entered and after all appeals had been exhausted, the court of appeals has invited use of Section 455 to relitigate prior unfavorable rulings despite the absence of any genuine prejudice. To make matters worse, it has made disqualification retroactive not just to the time that the district judge knew of the facts suggesting partiality, but to the time that he "should have known." Even the court of appeals felt obliged to note the "harsh consequences" and "problems with regard to the finality of judgments" occasioned by its rule.

The decision of the Fifth Circuit merits review for several reasons. First, it is in direct conflict with decisions of the Seventh Circuit barring retroactive relief under Section 455(a). See *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986); *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985). Second, by granting a motion made long after final judgment, the court of appeals extends the time for bringing motions to disqualify to unreasonable lengths. Finally, and in any event, the theory of "constructive knowledge" stretches Section 455(a) past the breaking point, effectively requiring a judge to recuse himself *sua sponte* based on facts that he does not know. Far from creating the desired confidence in the federal courts, the holding below introduces a capriciousness to judicial actions that disserves judges and litigants alike.

1. Section 455(a) Does Not Contemplate the Granting of Retroactive Relief Based Upon Motions Made After Final Judgment

A. The most striking fact about the court of appeals' decision is that it invalidates a judgment rendered more than 18 months before, and affirmed more than 10 months before, the motion to disqualify was filed. In taking this drastic step, the court did not find any actual impropriety or any actual prejudice to respondent. It simply concluded that Section 455(a) required retroactive recusal in cases raising "an appearance of partiality."[6]

The court recognized that its construction of Section 455(a) was open to criticism. It thus admitted that its rule "may seem harsh to the litigant who has fairly won a judgment and is deprived of it because the judge is charged with knowledge of an interest in the case." Pet. App. 11a. It also noted "problems with regard to the finality of judgments by allowing a party to overturn a judgment rendered months or years earlier based on the appearance of partiality, even though the judge was in

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[6] Although our quarrel with the Fifth Circuit is not over the finding of "an appearance of partiality," but over the consequences of that finding one and one-half years after judgment, it is worth noting that the appearance is a rather weak one. The facts discussed by the court do not involve the possibility of any personal gain to the district judge; they are concerned solely with his role as one of the trustees of Loyola University. This is not a case like *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), where the interest of the judge was "direct, personal, substantial [and] pecuniary. *Id.* at 1586, quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Moreover, for purposes of assessing the need for recusal under Section 455(b), Congress has expressly declared that "an office in an educational . . . organization is not a 'financial interest' in securities held by the organization." 28 U.S.C. § 455(d)(4). While the reach of subsections (a) and (b) is not identical, the distinction made by Congress implies that it did not have the same concerns regarding appearances where the judge was merely an officer of a nonprofit organization.

fact completely impartial." Pet. App. 11a. Yet, despite these concerns, it reiterated that the law in the Fifth Circuit is "that a party may move to vacate a judgment based solely on an appearance of partiality existing at the time that the judgment was rendered." Pet. App. 11a. See *Hall v. Small Business Association*, 695 F.2d 175, 179 (5th Cir. 1983); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 20 (1980).

The Seventh Circuit has taken a diametrically opposite view. In *United States v. Murphy*, *supra*, the court laid down a flat rule that "[i]n cases decided under § 455(a), disqualification runs from the time the motion was made or granted." 768 F.2d at 1539.[7] In placing on litigants the burden of moving for disqualification, the court went on to state: "Judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts." *Id.* at 1541. The court has reaffirmed that holding in later cases, emphasizing that "[d]isqualification for the appearance of impropriety runs prospectively only; even a successful motion does not vitiate acts taken before the motion was filed." *United States v. Widgery*, *supra*, 778 F.2d at 328; see also *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986). The Fifth Circuit acknowledged this doctrine, and the reasons for it, but declined to follow it. Pet. App. 11a-12a.[8]

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[7] Although the Seventh Circuit noted that counsel for the moving party had known some of the facts creating the possible appearance of partiality, it declined to base its decision on those grounds. See 768 F.2d at 1541.

[8] The decisions in *Widgery* and *Murphy* involved motions made by criminal defendants. In announcing the "prospective only" rule in *Murphy*, however, the Seventh Circuit relied upon a prior civil case, *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985).

In our view, the position taken by the Seventh Circuit makes considerable sense. To begin with, as even the Fifth Circuit was willing to concede, the contrary rule imposes a severe penalty on one of the litigants, while holding out the promise of a windfall for his opponent. Furthermore, the rule stimulates relitigation on grounds having little or nothing to do with the actual merits of the lawsuit. Given the prospect of a retroactive recusal, losing parties may well see Section 455(a) as a valuable hedge against an unfavorable judgment. In the worst of cases, a litigant may deliberately withhold a challenge to the presiding judge, or refrain from seeking out facts for such a challenge, with the thought that inaction will provide two chances to win his case. Even in less flagrant cases, a losing party may simply regard Section 455 as another strategy for attacking the judgment, increasing the number of challenges to federal judges and making all judgments subject to recall at the behest of a hypothetical "reasonable man."

This uncertainty may be a necessary evil in cases of actual impropriety or actual prejudice. But there is no good reason to endure it when the only issue is one of "appearances." The Seventh Circuit has made out a convincing case that "§ 455(a) is concerned with perceptions rather than actual defects in the administration of justice." *United States v. Murphy*, *supra*, 768 F.2d at 1540.[9] While it is plainly desirable to have perceptions about judicial fairness be free of doubts, that does not mean that perceptions of fairness and actual fairness are truly one and the same. At some point, concern about real injustice to the successful litigant, forced to surrender his judgment and begin again, should outweigh concern about a mere appearance of injustice to an unsuccessful one.

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[9] Congress has thus provided that parties may waive the right to recusal under Section 455(a) but not under Section 455(b). See 28 U.S.C. § 455(e).

The potential hardship resulting from the Fifth Circuit's rule is readily apparent in this case. By virtue of the decision below, the case is to be retried as if the first trial had never occurred. Yet, as might be expected, events outside the courtroom are not so easily erased. Since the time that the judgment became final (following affirmance by the court of appeals), petitioner has constructed a hospital pursuant to the certificate of approval at issue in the underlying lawsuit. It would cause obvious turmoil if a court were to rule that, despite the prior final judgment, the right to build the hospital had belonged to respondent all along. Even if petitioner should prevail a second time upon the retrial, the added costs of another proceeding, combined with the upheaval in the interim, will be substantial.

There is no evidence that Congress desired this irrational result. Indeed, the legislative history shows quite clearly that Congress was concerned about the use of Section 455 for purely tactical reasons. While Congress eliminated the so-called "duty to sit," it called particular attention to "the possibility that those who would question [a judge's] impartiality are in fact seeking to avoid the consequences of his expected adverse decision." H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6355. It thus cautioned that "a litigant's fear that a judge may decide a question against him" is not the same as "a 'reasonable fear' that the judge will not be impartial." *Id.* The language of this discussion—with its references to an "expected adverse decision" and "fear that a judge may decide a question against him"—strongly suggests that Congress had in mind motions for prospective disqualification. Furthermore, given its evident concern about strategic motions for recusal, it is unlikely that Congress wished to provide relief for an appearance of impropriety *after* an adverse decision, or to allow litigants to develop "fears" about partiality in light of an already unfavorable ruling.

A bar against retroactive relief also makes Section 455 more compatible with the other disqualification statute, 28 U.S.C. § 144. Section 144 provides that, upon the filing of a sufficient affidavit of bias and prejudice, a district judge "shall proceed no further therein, but another judge shall be assigned to hear such proceeding." As its terms indicate, Section 144 entitles the moving party to prospective relief only. See *Marty's Floor Covering Co. v. GAF Corp.*, 604 F.2d 266 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980). If Congress had intended to mark out a different course under Section 455(a), it would be reasonable to suppose that the Act or legislative history would say so.[10]

There is no compelling reason to make disqualification under Section 455(a) retroactive rather than prospective. The Seventh Circuit is correct in holding that, absent actual bias or prejudice, the recusal of a judge under that section does not void his prior rulings.

B. The court of appeals committed an even more fundamental error in this case by considering a motion to recuse after judgment had become final. In our view, Section 455 does not authorize motions for disqualification brought at such a late date.

This issue is, admittedly, not one on which Congress has given clear guidance. On its face, Section 455 does not impose a time limit for presentation of motions to disqualify. That silence is in contrast to the procedures set out in Section 144, which incorporates a specific (and now obsolete) time period for filing affidavits of bias and prejudice. See 28 U.S.C. § 144.[11] Indeed, Congress did

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[10] Several federal courts have recognized that the two statutes, while not identical, should be construed *in pari materia*. See *United States v. Faul*, 748 F.2d 1204 (8th Cir. 1984); *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978).

[11] Section 144 states that the affidavit must be filed "not less than ten days before the beginning of the term at which the proceeding

not include an express requirement of timeliness despite a suggestion by the Justice Department that it do so. See *Delesdernier v. Porterie*, 666 F.2d 116, 120-21 (5th Cir. 1982).

The legislative history, however, indicates that Congress expected motions to be filed, at the very latest, by the end of the time for appeal. In a colloquy directed at this very subject, Senator Bayh took the view that, if a litigant learned about grounds for disqualification under Section 455(b) after trial, "then I think that he should allege it as long as the right to appeal still exists; but if that has been exhausted and time has expired, then, I think he has lost his right. I think there has to be some end." Hearings on S. 1553 and S. 1886 before the United States Senate, Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 93rd Cong., 1st Sess. 22 (1971). John Frank, an advisor to the Senate Judiciary Committee, expressed a similar opinion: "[Y]ou could raise the question of interest just as you can raise the question of no jurisdiction because there is no diversity, or no jurisdiction because there was no federal question, you can raise it in the course of the litigation, but not after the litigation is over." *Id.* at 36. The unmistakable tenor of this testimony is that a motion after final judgment comes too late.

The approach taken by the Fifth Circuit carries no such limitation. The rule in that Circuit is that "when the party seeking recusal knows or should know of the facts on which recusal is based he must make a timely motion to disqualify or lose his right to do so." Pet. App. 12a. While that may be adequate to protect against some

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is to be heard, or good cause shall be shown for failure to file it within that time." That requirement has been replaced by a general requirement of filing within a reasonable time. *United States v. Hines*, 696 F.2d 722, 728 n.8 (10th Cir. 1982). In any event, however, relief under Section 144 is prospective only.

calculated abuses of Section 455, it does virtually nothing to advance the important interest in finality of judgments. Indeed, it focuses entirely on the knowledge of the moving party, without any regard at all for the stage of the case. As a result, a motion may be filed in the Fifth Circuit, as in this case, long after a case has seemingly been laid to rest.[12]

This open-ended standard puts final judgments in needless jeopardy. Carried to its logical conclusion, of course, it would mean that no judgment was ever final, since the losing party might later uncover some fact suggesting an appearance of impropriety. Although the judgment in this case had been final for approximately 10 months before the motion, the reasoning of the court of appeals would presumably require the same result if the interval had been 10 years. Quite apart from the views of Senator Bayh and John Frank, it is difficult to believe that Congress intended any such outcome, especially where no actual bias or prejudice has been shown.

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[12] The issue of the "timeliness" of motions has been a source of disagreement in the courts of appeals. Relying on the lack of an express limit in Section 455, the Seventh Circuit has declined to read a condition of timeliness into its provisions. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (1977). Other courts of appeals, however, including the Fifth Circuit, have made timeliness a consideration under Section 455. See, e.g., *In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *United States v. Schreiber*, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Delesdernier v. Porterie, supra; Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980); *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982); *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 729 (1984). Those courts have been particularly willing to raise concerns about timeliness when the moving party knew the relevant facts before judgment. See, e.g., *Oglala Sioux Tribe v. Homestake Mining Co., supra*, 722 F.2d at 1414; *United States v. Slay, supra*, 714 F.2d at 1094.

To date, no court of appeals has absolutely refused to consider motions to disqualify made after judgment;[13] nor, however, has any court gone so far as the Fifth Circuit in allowing motions to reopen judgments. Indeed, even during normal appellate proceedings, the Third and Ninth Circuits have suggested that post-judgment motions to disqualify will be subject to more stringent review. *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980); *United States v. Conforte, supra; United States v. Schreiber, supra.* Thus, in *United States v. Schreiber*, the court of appeals allowed a defendant to raise his claim under Section 455 for the first time on appeal, but reviewed it under a standard of "plain error" rather than the customary "abuse of discretion." The court indicated that reversals for plain error typically involved situations where the error was "grievous," or "so fundamental in nature as to deprive a party of fundamental justice," or so serious as to "constitute[] a 'manifest miscarriage of justice.'" *Id.* at 535. It specifically noted that the burden of establishing plain error was higher than that borne by litigants raising their challenges before the district court. *Id.* at 536.

The Ninth Circuit has indicated, without expressly deciding, that it will follow a similar rule. In *United States v. Sibla*, the court in dictum said that "if no motion is made to the judge, or if a conclusory motion is made without reference to specific facts allegedly creating grounds for relief, a party will bear a greater burden on appeal in demonstrating that the judge committed reversible error in failing to grant recusal under section 455." *Id.* at 868. In *United States v. Conforte*, the court stated that "timeliness cannot be disregarded in all cases involving the delicate matter of disqualification under section 455, although, as we did in *Sibla*, we leave open

[13] Although the Seventh Circuit permits such motions, its rule regarding prospective relief means, in effect, that judgments cannot be set aside absent actual bias and prejudice.

the question whether timeliness may be disregarded in exceptional circumstances." *Id.* at 880.

We question whether a failure to recuse, absent actual impropriety or genuine prejudice, would ever rise to the level of plain error or exceptional circumstances contemplated by these tests. If that premise were to prove correct, the rule in the Third and Ninth Circuits would, as a practical matter, amount to a total prohibition against post-judgment motions asserting only an appearance of impropriety. Even if these courts stop short of that point, however, it is clear that they are considerably more reluctant to overturn judgments than the Fifth Circuit. Nothing in the decision below makes consideration of a post-judgment motion depend upon a "manifest miscarriage of justice" or "exceptional circumstances." To the contrary, the court applies Section 455 even though the judge was unaware of the facts allegedly requiring recusal, and respondent suffered no prejudice at all.

It is not always easy to separate issues of timeliness, standards of review, and retroactive relief—or, indeed, the point of disqualification itself. See pages 16-21 *infra.* All affect, to one degree or another, the time at which motions can be made and the consequences of granting such a motion. As the decision in *Schreiber* demonstrates, a rule allowing motions to be made after trial or on appeal may be balanced by a rule requiring a more searching standard of review. Or, as the decisions of the Seventh Circuit indicate, a reluctance to place time limits on motions for recusal may be offset by a doctrine allowing only prospective relief. But no court except the Fifth Circuit expressly allows litigants to raise claims under Section 455(a) after trial and appellate proceedings are over, evaluates them under normal standards of review, and then makes relief retroactive so as to invalidate the prior judgment. The Fifth Circuit has simply gone too far.

2. Section 455(a) Does Not Incorporate a Standard of "Constructive Knowledge"

The Fifth Circuit, in assessing the grounds for recusal asserted by respondent, also held that Section 455(a) required recusal at the time that the judge had "constructive knowledge" of the facts raising questions about his partiality. This conclusion is a serious misreading of Section 455(a).

At the outset, we should note the link between this issue and that of retroactivity. If disqualification runs only from the time of filing a motion, then the imposition of a standard of "constructive knowledge" is largely beside the point: actions taken prior to the motion will stand and the motion itself should create actual knowledge on which to base prospective recusal. If Section 455(a) requires invalidation of past actions, however, there remains the difficult question of when a judge is deemed to be disqualified. We think that the *earliest* point should be when the judge actually knows of the facts requiring recusal. In this case, the Fifth Circuit held that a judge is disqualified from the point at which he "should have known" of those facts.[14]

The most obvious problem with the Fifth Circuit position is that it requires a judge to do an impossible act: recuse himself on the basis of facts that he does not know. Because the language of Section 455(a) is self-

[14] In this case, as the findings of fact make clear, Judge Collins did not have actual knowledge until March 24, 1982—eight days after judgment was entered. The court of appeals recognized that disqualification as of that date would have made no practical difference because "the only effect of Judge Collins' recusal on March 24 would have been to allow HSAC to make any post-trial motions to a different judge, yet HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make." Pet. App. 8a-9a.

executing, and contemplates that a judge will disqualify himself without any motion, the theory of "constructive knowledge" literally requires the judge to act when he knows of no reason to act. There is no basis in Section 455(a) for saying that Congress imposed on judges a duty that they could not possibly perform, while requiring judgments to be invalidated as the penalty for not performing it.

The only explanation offered for finding this duty in Section 455(a) is that it "discourages a judge from ignoring or failing to investigate a possible conflict of interest." Pet. App. 12a.[15] While this observation may well be true, it serves as only the starting point for analysis. For the rule applied by the Fifth Circuit enforces the duty, not by disciplining the judge, but by penalizing one of the parties. The proper inquiry, therefore, is not whether the law should promote judicial diligence, but whether that goal justifies the loss of a judgment won after an admittedly impartial trial. In our view, the sanction is both excessive and misdirected.

The effort to increase judicial diligence is also a two-sided coin. While the holding below may discourage judges from disregarding or failing to investigate possible conflicts, it may encourage litigants to do so. As we have already discussed, in some cases a litigant may choose to see the judgment entered by the court before deciding whether to raise (or investigate) facts about an appearance of impropriety.[16] This inclination is further rein-

[15] Section 455 already charges federal judges to "inform [themselves] about [their] personal and fiduciary interests," as well as the affairs of their families. 28 U.S.C. § 455(c).

[16] If the facts are ones indicating a reason to favor the other party, there would seem to be little risk that a judgment *against* the other party could be overturned. A litigant withholding such

forced if the litigant understands that he does not later have to show actual knowledge on the judge's part. As the Seventh Circuit stated in *United States v. Murphy*, *supra*, "[a] criminal trial is too serious and costly to permit a defendant to sit on possible errors, hoping to have a crack at an acquittal (or low sentence) and then still a second trial." *Id.* at 1541. This observation seems no less apt in civil cases.[17]

The second problem with the "constructive knowledge" theory is that it works at cross-purposes with the provisions of Section 455(b)(4). That subsection, by its plain terms, requires a judge to recuse himself only when "[h]e knows" that he has a financial or other interest in the proceeding before him. While subsection (a) concededly may reach conduct that subsection (b) does not, it would make little sense for Congress to include the element of knowledge in the latter section only to see it immediately read out again in the former. Yet, under the rationale of the Fifth Circuit, a judge violates subsection (b) if he sits knowing of a financial interest and subsection (a) if he sits without knowing of it.[18]

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facts, therefore, might believe that he had much to gain, but little to lose.

[17] The Fifth Circuit said that "[o]n August 17, 1983, HSAC learned that Judge Collins was and had been a member of the Board of Trustees of Loyola University." Pet. App. 2a. Based upon that knowledge, respondent sought to vacate the judgment a week later. That information, however, had been included in Judge Collins' financial disclosure statement filed on May 15, 1981, more than six months before the suit was filed. It was included again in the statement filed on May 15, 1982, while the case was pending on appeal.

[18] While it might be said that ownership of a small amount of stock would not be enough to create an appearance of partiality, the specific provisions of Section 455(b)(4) were intended to eliminate just that sort of guesswork. The rule of (b)(4) is that any financial interest, however small, is grounds for disqualification once the court becomes aware of it.

Although it might be possible to reconcile these provisions by finding "constructive knowledge" in (b)(4) as well, that solution seems unworkable for several reasons. In the first place, the Fifth Circuit appears to have accepted that "constructive knowledge" is not enough to support recusal under subsection (b)(4). Pet. App. 11a.[19] Moreover, in cases decided to date, no court applying (b)(4) has ever struck down actions taken before the judge actually learned of the relevant financial interest. For example, in *In re Cement and Concrete Anti-Trust Litigation*, 515 F.Supp. 1076 (D. Ariz. 1981), *mand. denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (1983), the district judge had made numerous rulings in a class action before learning that his wife owned stock in several class members. In deciding that he was obliged to recuse himself prospectively, the judge emphasized that "article 455 does not require disqualification until a Judge 'knows' that he has a financial interest." He went on to explain that this ruling was compelled by common sense: "Until he is so informed, how can there be a conflict? How can there be even the appearance of impropriety? More importantly how can it be contended that his past decisions can be affected by a financial interest of which he was unaware." *Id.* at 1081. The same approach was followed in *Catherines v. Copytele, Inc.*, 608 F. Supp. 1031 (E.D.N.Y. 1985), where the judge made numerous rulings while unknowingly holding stock in the parent company of a defendant, and in *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, *supra*, where the trial judge had presided over a class action for more than a year after marrying a man who owned stock in a class member.[20] Under the Fifth

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[19] If the court of appeals believed otherwise, it could not logically have decided that Judge Collins' prior knowledge, which he had forgotten by the time of the suit, was inadequate to support invalidation of the judgment under (b)(4). Pet. App. 9a-10a.

[20] Saying that the court had no knowledge of the ownership at the time of the rulings, the court in *Catherines v. Copytele, Inc.*,

Circuit's theory, however, each of the judges presumably could have been charged with "constructive knowledge" of the various stockholdings, and thus disqualified under Section 455(a) from the time that their ownership of the securities came into being.

Finally, the theory of "constructive knowledge" depends upon an ill-conceived revision of the "reasonable person" test. The usual test is a straightforward one: "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973). If that test were applied according to its literal terms, there could be no grounds for disqualification prior to actual knowledge because the reasonable man knowing "all the circumstances" would realize that a judge could not be influenced by unknown interests. The Fifth Circuit, however, has decided that the test should be whether "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of the facts indicating his interest or bias. Pet. App. 11a. Furthermore, the court has limited "all the circumstances" to those "that are objectively ascertainable." Pet. App. 11a. See *Hall* v. *Small Business Administration*, *supra*, 695 F.2d at 179.

The effect of these revisions is to make the "reasonable person" test illogical. According to the Fifth Circuit, the "reasonable person" knows everything about a judge's interest in the case, but does not know whether the judge knows it. But if the judge does not in fact know of the

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found no reason "why it shouldn't proceed in these matters as it did." 608 F. Supp. at 1032. In *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, the court allowed prior rulings to stand and approved reassignment of the case to the judge after her husband disposed of the stock in question. 782 F.2d at 715-16.

interest, then there is no cause for a "reasonable person" to suspect bias; it is the judge's *knowledge* of a possible interest that theoretically might lead him to favor one party over another. There is a great difference between the deliberate decision of a judge to hear a case in which he has an interest and an unwitting one. The Fifth Circuit has made the latter conduct improper simply by presuming that the judge knows what he does not.[21]

This presumption is wholly out of place within the provisions of Section 455(a). To any but the most jaded observer, it is far from likely that a federal judge, claiming lack of knowledge about a possible interest in litigation, actually has that knowledge. Thus, even if the consequences of the Fifth Circuit's rule were less severe, it would seem inappropriate to act as though judges are aware of an apparent bias, yet are ignoring the command of Section 455(a). It is all the more inappropriate when the effect of that presumption is to undo perhaps years of proceedings, to the detriment of a party who has secured a final judgment. At the very earliest, a violation of Section 455(a) should occur at the point when a judge continues to sit despite actual knowledge that he should step aside.[22] That is not the case here.

3. The Issues Presented In This Case Are Important To The Administration of Justice

The Ninth Circuit has noted that the interests at stake in disqualification motions are far broader than those of the individual litigants. See *In re Cement and Concrete*

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[21] As we have noted, a separate district judge in this case specifically found that Judge Collins did not know about the pertinent negotiations from the time of filing to the time of judgment. Pet. App. 23a-25a.

[22] As we have previously said, see pages 7-11 *supra*, we think that the proper rule is the one announced by the Seventh Circuit, barring retroactive relief in cases of "appearances of partiality."

Anti-Trust Litigation, 688 F.2d 1297 (9th Cir. 1982). But, just as motions for recusal can promote justice, they can be used to defeat it as well. The rules applied by the Fifth Circuit in this case do more to create unfairness than to cure it.

The importance of the issues presented by this case extends beyond the parties, or even the litigants in the Fifth Circuit. The restrictions of Section 455(a) apply to every federal judge.[23] Because of the subjective nature of "appearances," it is probably inevitable that some uncertainties regarding its application will persist. But, at the very least, judges and litigants are entitled to know when motions under Section 455 may be made and considered; whether (and in what circumstances) past actions may be set aside pursuant to such motions; and, if they may be, when the time of disqualification is deemed to run. At present, as we have discussed, the answers to those questions are anything but uniform among the Circuits.[24]

These issues warrant the attention of this Court. For the benefit of both litigants and judges themselves, the Court should grant a writ of certiorari and resolve them.

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[23] Although motions for recusal are most common in district courts, they are not restricted to that level. See *Milton Hodosh and Richardson Vicks, Inc. v. Block Drug Co., Inc.*, 790 F.2d 880 (Fed. Cir. 1986). See generally *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986).

[24] The answers to these questions will have other doctrinal implications as well. For example, as a consequence of its holding that a judge's failure to disqualify himself under Section 455(a) does not deprive a litigant of any personal rights, the Seventh Circuit has also held that orders denying motions to recuse are not appealable; in that Circuit, the only review of such orders is by mandamus. *United States v. Balistrieri*, 779 F.2d 1191 (1985). The Fifth Circuit, however, as this case demonstrates, does review such orders on appeal. Other Circuits also review orders regarding recusal on appeal, while leaving open the possibility of mandamus in exceptional cases. See, e.g., *In re International Business Machines Corp., supra*, 618 F.2d at 926-27.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 86-3069

HEALTH SERVICES ACQUISITION CORP.,
Plaintiff-Appellant,

v.

JOHN A. LILJEBERG, JR.,
Defendant-Appellee.

Aug. 13, 1986

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, GARZA, and JOHNSON, Circuit Judges.

CLARK, Chief Judge:

Appellant Health Services Acquistion Corporation (HSAC) appeals from the denial of its motion to vacate a judgment and to grant a new trial. Finding that the judge who rendered the judgment against HSAC had constructive knowledge of facts sufficient to create an appearance of impropriety under 28 U.S.C. §455(a), we reverse and remand.

I

On November 30, 1981, HSAC brought an action for declaratory judgment in district court against John A. Liljeberg, Jr. to determine the ownership of a corporation known as "St. Jude Hospital of Kenner, La., Inc." This corporation had a state certificate of approval permitting it to construct a hospital. A trial on the merits was held before Judge Robert F. Collins, who rendered judgment for Liljeberg. Judgment was entered on March 16, 1982. The Fifth Circuit affirmed.

On August 17, 1983, HSAC learned that Judge Collins was and had been a member of the Board of Trustees of Loyola University. Loyola had been negotiating with Liljeberg to sell him property on which he could build a hospital; however, Liljeberg's ability to build the hospital was dependent on his obtaining control of the certificate of approval.

Based on this information, HSAC filed a motion to vacate the judgment and for a new trial. Judge Collins denied the motion, stating that he had not been involved in negotiations between Loyola and Liljeberg and had no knowledge of these negotiations.

The Fifth Circuit reversed. *Health Service Acquistion Corp. v. Liljeberg*, 747 F.2d 1463, slip op. at 7 (5th Cir. 1984) (unpublished). While recognizing that there was no question as to the actual impartiality of Judge Collins, the court noted that "the judiciary must be governed by the appearance, as well as the reality, of disinterested adjudication." *Id.* The court therefore remanded the case to the district court for a determination of when Judge Collins learned of Loyola's interest in the lawsuit. On remand, a hearing based solely on documentary evidence was held before another judge.

The district court made the following findings.

Judge Collins had been a member of the Loyola Board of Trustees from 1977 to 1983. During that time the

Board met five times a year. The minutes of each meeting were prepared several weeks after the meeting. The minutes, along with an agenda for the upcoming meeting and materials relevant to issues to be considered at that meeting, were then mailed to each Board member.

The disposition of certain property owned by Loyola, known as the Monroe Tract, was discussed at Board meetings in early 1979. The first mention of the St. Jude Hospital was made in the minutes of the November 29, 1979 meeting; Board members were informed that Loyola representatives had discussed selling Loyola property to a group of developers interested in building the hospital. It was also mentioned that the Board wanted to have this property rezoned.

The St. Jude Hospital was discussed at the January 24, 1980 Board meeting, which Judge Collins attended. The Real Estate Committee (of which Judge Collins was not a member) presented a report to the Board on the negotiations between Liljeberg and Loyola. The report discussed two offers from Liljeberg to Loyola and stated that Loyola had expressed interest in continuing negotiations with St. Jude. The Real Estate Committee also had informed Liljeberg that Loyola would probably not be interested in the project until a state certificate of approval was secured. Following the report, the Board voted to refer Liljeberg's second offer to the Real Estate Committee for further study. Judge Collins was present at the time this report was read and heard the report, in which the names of Liljeberg and St. Jude Hospital were mentioned a number of times.

At the March 6, 1980 meeting the Real Estate Committee recommended rejection of Liljeberg's offer, noting that Liljeberg had not yet obtained a certificate. Judge Collins did not attend this meeting.

There was a subsequent lull in negotiations between Loyola and Liljeberg. However, at the September 25,

1981 meeting the Real Estate Committee indicated renewed activity regarding the possible construction of a hospital on the Monroe Tract. Judge Collins was present at this meeting.

At the November 12, 1981 meeting, which Judge Collins attended, there was speculation that the building of a hospital on the Monroe Tract would be a major investment advantage for Loyola. The Board approved a resolution calling for renewed negotiations with the St. Jude group and for efforts to have the surrounding area rezoned. Rezoning was discussed as a condition of the sale to Liljeberg and the building of the hospital.

Based on Judge Collins' attendance at meetings during which the sale to Liljeberg was discussed, Judge Collins had actual knowledge of Loyola's interest in the St. Jude Corp. at the time of those meetings on January 24, 1980 and September 25, 1981. However, Judge Collins had forgotten about Loyola's interest by the time the lawsuit came under his control in January 1982. Judge Collins did not obtain actual knowledge until March 24, 1982. At that time he reviewed material that had been sent to him in preparation for the March 25 meeting. This material informed the Board members that the Loyola Executive Committee had approved the sale of some 80 acres in the Monroe Tract to Liljeberg for the construction of a hospital.

Although the district court found that Judge Collins had actual knowledge of Loyola's interest in the litigation on March 24, 1982, it determined that Judge Collins was not required to recuse himself at that time because Loyola's interest terminated on March 19 when it entered the agreement to sell the property to Liljeberg. The agreement expressly stated that it was not contingent on Liljeberg's obtaining a certificate of approval in the pending litigation. Therefore the district court concluded that Loyola ceased to have any stake in the outcome of the litigation as of March 19. Since Judge Collins did not

have actual knowledge of Loyola's interest during the time that he controlled the case *and* that interest still existed, the district court found that Judge Collins was not required to recuse himself.

The district court also found, however, that Judge Collins had constructive knowledge of Loyola's interest in the litigation at all relevant times during the lawsuit. Specifically, the court noted that Judge Collins knew that Loyola owned the Monroe Tract and was trying to sell it, that he had been present at the January 24, 1980 meeting during which the negotiations with Liljeberg and the importance of the certificate for the contemplated hospital were reported by the Real Estate Committee, that he had attended other meetings at which the negotiations for the sale of the Monroe Tract to developers of the St. Jude Hospital had been discussed and approved, and that there was written information sent to and available to him regarding the negotiations with Liljeberg and Loyola's interest in the disposition of the certificate. The court found that these facts provided a basis for imputing knowledge of Loyola's interest to Judge Collins and created an appearance of partiality under 28 U.S.C. § 455 (a).

Despite the finding of constructive knowledge, the district court held that Judge Collins was not required to recuse himself because the Fifth Circuit's remand had been limited to the question of actual knowledge. Since the court found that recusal would not be mandated by Judge Collins' actual knowledge, it denied HSAC's motion to vacate the judgment and grant a new trial. HSAC appeals.

II

28 U.S.C. § 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(4) [Where he] knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

The goal of the disqualification statute is to promote public confidence in the judicial system by avoiding even the appearance of partiality. *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir.1982), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983). In particular, section 455(a) was intended to establish an objective test so that "disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

In the present case there can be no serious doubt that Judge Collins, as a member of the Loyola Board of Trustees, had an interest in the well being of Loyola University.[1] Nor can it be doubted that that interest would be substantially affected by the outcome of the lawsuit between Liljeberg and HSAC since Loyola was negotiating with Liljeberg to sell him land on which to build a hospital and Liljeberg's ability to build the hospital was largely dependent on the outcome of the litigation. The question in this appeal is the effect of what Judge Collins knew or should have known about Loyola's interest in the lawsuit at the time he knew or should have known it.

[1] The prior panel was of the opinion that Judge Collins' interest constituted an "other interest" rather than a "financial interest" under section 455(b)(4). *See Health Services*, slip op. at 6 (citing 28 U.S.C. § 455(d)(4)(ii)). We accept that conclusion for the purposes of this opinion without analysis of its validity or precedential effect.

A

HSAC advances three theories under which Judge Collins was required to recuse himself in this case. First, HSAC notes that it is undisputed that Judge Collins had actual knowledge of Loyola's sale to Liljeberg as of March 24, 1982, eight days after the judgment was entered. At that time Judge Collins still controlled the litigation because he could have granted a new trial or amended the judgment. *See* Fed.R.Civ.P. 59 (within 10 days of the entry of judgment a party may move for a new trial or the court on its own initiative may order a new trial); Fed.R.Civ.P. 52(b) (upon the motion of a party made within 10 days of the entry of judgment the court may amend the judgment). Therefore, HSAC contends that on March 24 Judge Collins should have recused himself and informed the parties of his recusal so that they could direct any motions for a new trial or to amend the judgment to a different judge.

Liljeberg responds that Judge Collins was not required to recuse himself or notify the parties on March 24 because, as the district court found, Loyola's interest in the litigation terminated on March 19 when it entered into an agreement to sell the property in question to Liljeberg. The agreement explicitly stated that it was in no way conditioned on the outcome of the litigation between HASC and Liljeberg.

Furthermore, Liljeberg argues that even if Judge Collins was required to disqualify himself on March 24 this did not invalidate the judgment entered on March 16.

Since HSAC in fact made no motion for a new trial or to amend the judgment, Judge Collins' failure to disqualify himself had no effect on the litigation.

The district court's determination that Loyola's interest in the litigation terminated as of March 19, 1982 is clearly erroneous. Although the agreement between Loyola and Liljeberg was not contingent on the outcome of the lawsuit, as a practical matter Loyola still had a substantial interest in Liljeberg's obtaining the certificate of approval. Without the certificate, it is very likely that Liljeberg would not have been able to build the hospital on the Monroe Tract. The construction of a hospital on its property was extremely important to Loyola as shown by the fact that Loyola was allowed under its agreement with Liljeberg to repurchase the land if a hospital was not build. Furthermore, the construction of a hospital on the Monroe Tract was critical to the effort to rezone the surrounding property owned by Loyola; the rezoning was also of vital interest to Loyola. Therefore, Loyola's interest in the litigation did not terminate as of March 19, 1982 and Judge Collins should have recused himself when he obtained actual knowledge of that interest on March 24.

Liljeberg's second argument is more troublesome. It is true that the actual knowledge Judge Collins obtained on March 24, by itself, did not require vacating the judgment entered on March 16. Generally a judge who learns that he has a financial or other interest in a case is only required to recuse himself from future proceedings. *In re Cement and Concrete Antitrust Litigation*, 515 F.Supp. 1076, 1081-82 (D.Ariz.1981), *appeal dismissed*, 673 F.2d 1020 (9th Cir.), *appeal dismissed*, 459 U.S. 961, 103 S.Ct. 285, 74 L.Ed.2d 272, *mand. denied*, 688 F.2d 1297 (9th Cir.1982), *aff'd for absence of a quorum*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983); 13A C. Wright & A. Miller, *Federal Practice and Procedure* § 3546 n. 13. Thus, the only effect of Judge Collins'

recusal on March 24 would have been to allow HSAC to make any post-trial motions to a different judge, yet HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make.

On the other hand, there can be no doubt that Judge Collins should have recused himself on March 24 and immediately informed the parties of his recusal and the reasons for it. In this regard, it makes no difference how much practical effect such action would have had on the outcome of the litigation. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway. *Cf.* Wright & Miller, *supra*, § 3553 ("[t]here should be no room in [the recusal] context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner").

Judge Collins erred in failing to recuse himself on March 24 when he obtained actual knowledge of Loyola's interest in the litigation. However, our resolution of the constructive knowledge issue, *see infra* subsection C, makes it unnecessary to decide what the proper appellate remedy for this error would be.

B

The second theory advanced by HSAC is that Judge Collins' recusal was required by his actual knowledge, prior to the litigation, of Loyola's dealing with Liljeberg. The district court found that Judge Collins had actual knowledge of these dealings on January 24, 1980 and September 25, 1981 but that he had forgotten about them by the time the litigation commenced. Given the presence of Judge Collins at meetings in which these dealings were extensively discussed, the finding of actual knowledge is not clearly erroneous.

HSAC argues that failure to recall facts which indicate an interest or bias on the part of the judge will not avoid the necessity of recusal. It relies on *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir.1978), and *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (N.D.Miss.1983). In *Rice* the court held that the district judge who had no recollection of a case in which he had participated as a state judge was nonetheless required to recuse himself under section 455(a) because of the appearance of partiality created. *Rice*, 581 F.2d 1117-18. In *Limeco* the judge granted a motion to recuse based on a vote which he had made in the Mississippi legislature 41 years earlier and which he had completely forgotten. *Limeco*, 571 F. Supp. at 711.

In both *Rice* and *Limeco* the facts forgotten by the judges were brought to their attention at the time motions were made to disqualify them from further proceedings. If a recusal motion had been made to Judge Collins during trial he too could not have refused to disqualify himself on the grounds that he had forgotten about Loyola's interest.

However, a different situation is presented here because the recusal motion seeks to invalidate judicial actions taken before the judge recalled facts indicating an interest or bias. Since the judicial actions were taken without knowledge of those facts, no appearance of impropriety could arise merely because the judge knew the facts at some prior time. For example, if the recusal motion in *Limeco* had been made after the judge had rendered judgment, the judgment could not have been overturned merely because the judge had forgotten his vote in the Mississippi legislature 41 years earlier. Therefore, HSAC's argument that actual knowledge subsequently forgotten must always require recusal is too broad.

C

The third theory advanced by HSAC is that Judge Collins' constructive knowledge of Loyola's interest in

the litigation required his recusal. Since we find no cases directly addressing this issue, we turn to the language and purpose of the disqualification statute.

While section 455(b)(4) requires that a judge *know* that he has an interest in the litigation before recusal is required, section 455(a) does not explicitly require knowledge. Furthermore, the terms of section 455(a) are mandatory and self-executing; the judge must recuse himself where there is an appearance of partiality regardless of whether a motion to recuse had been made.

The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir.1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

This rule may seem harsh to the litigant who has fairly won a judgment and is deprived of it because the judge is charged with knowledge of an interest in the case. It also presents problems with regard to the finality of judgments by allowing a party to overturn a judgment rendered months or years earlier based on the appearance of partiality, even though the judge was in fact completely impartial. Such difficulties led the Seventh Circuit to hold that disqualification under section 455(a) runs only from the time that a recusal motion is made or granted. *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir.1985),

cert. denied, —— U.S. ——, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

This court, however, has held that a party may move to vacate a judgment based solely on an appearance of partiality existing at the time the judgment was rendered. *Hall*, 695 F.2d at 179-80. Of course, when the party seeking recusal knows or should know of the facts on which recusal is based he must make a timely motion to disqualify or lose his right to do so. *Delesdernier v. Porterie*, 666 F.2d 116, 121-23 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982). In the present case the motion by HSAC was timely. *Health Services*, slip op. at 5. In *Hall* we vacated a judgment entered by a magistrate whose law clerk had accepted employment with a law firm representing the plaintiffs. Although there was no suggestion of actual partiality, we held that the appearance of partiality alone required the judgment to be vacated. *Id.* at 180. Although *Hall* did not involve constructive knowledge, the constructive knowledge rule we adopt serves the same ends served by *Hall*. In *Hall* the magistrate failed to recognize that his law clerk's conflict of interest created an appearance of impropriety; in the constructive knowledge situation the judge fails to perceive or recall the facts creating the appearance of impropriety. The constructive knowledge rule, like *Hall*, discourages a judge from ignoring or failing to investigate a possible conflict of interest.

Because of the harsh consequences that can result, knowledge of facts requiring recusal should not be lightly imputed to a judge. Where a reasonable person would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist. In the present case, however, an objective observer would firmly expect that Judge Collins would have actual knowledge of Loyola's interest in the case. The district court so found. Judge Collins attended a number of meetings in which Loyola's negotiations with Liljeberg and St. Jude were discussed. These meetings took place as late as

November 1981, just two months before the trial. Furthermore, Judge Collins was sent written material which clearly disclosed Loyola's interest in the litigation. At the very least, a reasonable observer would expect that Judge Collins would remember that Loyola had had some dealings with Liljeberg and St. Jude and seek to ascertain the nature of these dealings. This is not to suggest that Judge Collins was other than completely candid in denying any recollection of these dealings. It is merely to say that the failure of a judge to recall or perceive information which he had been recently exposed to on a number of occasions would not be expected by the objective observer. The district court properly found that Judge Collins had constructive knowledge of Loyola's interest.

The district court erred, however, in concluding that recusal due to constructive knowledge was barred by the law of the case doctrine. The Fifth Circuit opinion remanding this case did not explicitly limit the remand to the question of actual knowledge. The evidence suggesting constructive knowledge was not before the court at that time. Assuming that the remand order had been limited to the actual knowledge issue, the law of the case doctrine would not apply because the evidence developed on remand was substantially different. *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967).

III

The determination that Judge Collins' constructive knowledge of Loyola's interest requires his recusal under section 455(a) means that the district court's supplemental order denying HSAC's motion to vacate the judgment and grant a new trial must be reversed. The original judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

ORIGINAL JUDGMENT VACATED, SUPPLEMENTAL ORDER REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action 81-4714

SECTION "A"

HEALTH SERVICES ACQUISITION CORP.

VS.

JOHN A. LILJEBERG, JR.

[Filed Dec. 27, 1985]

OPINION

SCHWARTZ, J.

This matter came before the Court for nonjury trial on September 13, 1985, on remand from the Fifth Circuit Court of Appeals, for partial trial pertaining to the issue of Judge Collins' knowledge of Loyola University's interest in the subject litigation. At that time the parties declined to offer live testimony and submitted the matter to this Court upon depositions, exhibits and memoranda. After review of the record, the memoranda, and the applicable law, the Court rules as follows. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any of the legal conclusions constitute factual findings, they are so adopted.

Introduction

The subject litigation was filed by Health Services Acquisition Corp. ["HSA"] on November 30, 1981 to obtain declaratory judgment as to the ownership of St. Jude Hospital of Kenner, Inc. ["St. Jude"]. Trial on the merits was held before the Honorable Robert F. Collins on January 21-22, 1982, and on March 12, 1982, Judge Collins rendered judgment, entered March 16, 1982,[1] dismissing HSA's case and declaring Liljeberg to be the owner of St. Jude, which decision was subsequently affirmed by the Fifth Circuit on October 18, 1982 (App. No. 82-3240).

On August 17, 1983, HSA learned that Judge Collins was a member of the Board of Trustees of Loyola University during the pendency of negotiations between Loyola and defendant Liljeberg for the sale of certain Loyola property in the "Monroe Tract" to Liljeberg for the express purpose of building the St. Jude Hospital.[2] As the opinion of the Fifth Circuit reflects, St. Jude Inc. had obtained a § 1122 certificate of approval from the State of Louisiana, to construct a hospital in the name of St. Jude, and the Fifth Circuit acknowledged Loyola's potentional general interest in the ownership of St. Jude Inc. and its corresponding certificate, because use of a portion of the Loyola tract for the St. Jude hospital might increase the value of Loyola's surrounding properties.[3]

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[1] See Document No. 49 in the record of these proceedings, labelled plaintiff's Exhibit 12.

[2] This Court does not read the Fifth Circuit's mandate as requiring any inquiry into the delay in raising Judge Collins' trusteeship or into any fault of the Liljeberg interests who may themselves have known of Judge Collins' trusteeship.

[3] See also Minutes of the Board of Trustees, Plaintiff's Exhibit 25; Eckholdt Deposition, pp. 31-32 regarding the importance of the certificate. As will be discussed more fully below, the parties have not demonstrated any substantial interest Loyola might have in the outcome of this case.

By contrast, HSA had already purchased another tract for construction of the hospital, should it have been declared owner of the corporation and certificate.

On August 24, 1983, HSA filed a motion to vacate the March 1982 judgment and sought Judge Collins' recusal under 28 U.S.C. § 455(a) and (b) (1982). Judge Collins denied the motion and declined to recuse himself, emphasizing that he did not participate in any of the negotiations concerning the Loyola tract and in fact, had no knowledge of such transactions at the times in question. HSA appealed to the Fifth Circuit, and as indicated above, the Fifth Circuit remanded the matter to a judge other than Judge Collins "so that the court may determine precisely when Judge Collins learned of Loyola's interest", elaborating, "[T]he judiciary must be governed by the appearance, as well as the reality, of disinterested adjudication."

As stated by the Fifth Circuit, there is absolutely no suggestion that Judge Collins was in any way partial, nor is there any question whatsoever of Judge Collins' candor in indicating that he had no actual knowledge of the transaction in question during the pendency of his decision making. However, the parties dispute the scope of the remand to this Court, with defendant contending this Court is limited to consideration of Judge Collins' actual knowledge based upon his deposition testimony alone, whereas the plaintiff urges this Court to look to all surrounding circumstances to determine when Judge Collins might be charged with constructive knowledge of the transaction in question. Defendant accordingly objects to plaintiff's exhibits and deposition submissions on the basis of relevancy.

This Court perceives its role as strictly limited to a determination when Judge Collins obtained actual knowledge of any interest on Loyola's part in the outcome of this case and whether such actual knowledge was obtained during his control of any aspect of the case. However, because of the Fifth Circuit's express concern for the appearance of impropriety and this Court's own consequent uncertainty as to the scope of the remand, the Court has also considered whether Judge Collins might be charged with constructive knowledge of Loyola's interest in the Liljeberg/HSA controversy, so as to create an appearance of partiality. These determinations have been made for the benefit of any reviewing Court in order to put this matter to rest. The Court has therefore overruled defendant's objections to the plaintiff's exhibits and testimony for purposes of making this alternate determination, although many of the factual determinations regarding constructive knowledge could be made on the basis of Judge Collins' deposition and deposition exhibits alone. To that extent, much of the other testimony and exhibits is merely cumulative.

Findings of Fact

Judge Collins was a member of the Loyola Board of Trustees from 1977 through 1983. See Judge Collins' Deposition, p. 16.

Information regarding the activities of the Loyola Board of Trustees was routinely disseminated to all Board members during the time period January 1979 through March 1982. This process was detailed by Mr. John Eckholdt, the Vice President of Business and Finance for Loyola University. The Board of Trustees met five times a year; each meeting was two months apart, except for the summer months when the Board is not convened at all. See Deposition of John Eckholdt, submitted as Plaintiff's Exhibit 2, p. 9. The minutes of the Board of Trustees were prepared several weeks after each meeting, see Judge Collins' Deposition, p. 9, and were regularly mailed to each member of the Board at the address designated by each member for such purposes. *Id.* at p. 10. This procedure was followed from January 1979 through March of 1982. *Id.* The minutes

were accompanied by a cover letter which indicated the date on which they were mailed. *Id.* at pp. 12-13. In addition to the minutes of the preceding meeting, the agenda for the upcoming meeting was also sent in each such Board mailing, *id.* at p. 22, and the agenda for an upcoming meeting might have had materials attached relevant to issues to be considered at the upcoming meeting. *Id.*

The minutes of the Board always stated who was present and who was absent, and this information was contained on the opening page of the minutes of each meeting. *Id.* at p. 29.

Insofar as real estate transactions were concerned, the Real Estate Committee, acting through its chairman, routinely reported to the full Board in the form of a series of recommendations concerning real estate activity. These would generally take the form of motions for the Board to consider, approve or reject. For example, Board action with respect to the sale of Loyola's property to Liljeberg would follow a recommendation from the chairman of the Real Estate Committee; these recommendations were contained in the agenda file of the Board. *Id.* at pp. 41-42.

The materials routinely mailed to the Board members refer to the negotiations culminating in the sale of portions of the Monroe Tract to Liljeberg. Thus, as early as March 15, 1979, the Board received a report from Mr. Eckholdt on the transactions between Loyola University and the Kenner City Council with regard to Loyola's Kenner property. See Eckholdt Deposition, pp. 12-14; Plaintiff's Exhibit 19. Judge Collins was reported to have been present at this meeting.

The disposition of the Monroe Tract was considered at the July 7, 1979 Board meeting, which was attended by Judge Collins. At that time, Mr. Sam Romano's offer to purchase a portion of the Monroe Tract was rejected by the Board by unanimous vote. See Eckholdt Deposition, p. 19; Plaintiff's Exhibit 20.

The first mention of the St. Jude Hospital project is contained in the minutes of the Board of Trustees of November 29, 1979:

> Although there will not be a great deal of activity regarding zoning changes until after the December 8, 1979 elections, Fr. Carter and Mr. Eckholdt have met with a group of developers interested in acquiring a portion of Loyola's property for a hospital facility, to be called the St. Jude Medical Center . . . This land is presently zoned C-2 commercial. The Board has previously decided not to sell any land zoned C-2 commercial. Therefore, zoning negotiations are underway with the City of Kenner, since a hospital does not require a C-2 commercial zoning, to attempt to have the commercial zoning moved in a north-south direction, rather than in its present east-west direction.

Plaintiff's Exhibit 21.

Discussions of the St. Jude Hospital project are reflected in the minutes of the next meeting of the Board of Trustees on January 24, 1980, which Judge Collins attended. See Plaintiff's Exhibit 22. Liljeberg's first offer on behalf of St. Jude Properties to purchase approximately 75 acres of Loyola's Kenner property was presented in a Real Estate Committee report, which was summarized in the Board minutes. The minutes also include the response of Loyola University to Liljeberg, including the Committee's expression of interest in continuing negotiations with St. Jude Properties. The minutes further reflect the Real Estate Committee's communication to Liljeberg that "until a certificate of need were forthcoming, Loyla would more than likely not be interested in the project." The minutes outline the terms of a second offer received by Loyola University from St.

Jude Properties raising the purchase price by $7,000.00 per acre, "with no financing necessary and no commitments of any kind except the dedication of 110 feet for roadway purposes, with the improvement cost paid totally by the Liljeberg group." The minutes elaborate on the details of the offer, including St. Jude Properties' desire for a sixty day period to secure financing to finalize the sale.

These minutes further report the Board's unanimous motion to refer the offer made by St. Jude Properties, Inc. to the Real Estate Committee for further study and discussion, and to have St. Jude Properties informed of this action. Judge Collins was listed as being present at the meeting and presented a motion to the Board with respect to the activities of the Student Affairs Committee on which he served *after* the Real Estate Committee's report. Eckholdt Deposition, p. 36; Plaintiff's Exhibit 22. Judge Collins was present and the Court finds he must have heard the above report.

At the March 6, 1980 meeting of the Loyola University Board of Trustees, the Real Estate Committee and the President's Council Real Estate Committee reported their recommendation to reject the most recent offer made by St. Jude Properties and to end the negotiations. Contained in the report was a summary of the offer as well as the observation that the Liljeberg interests had not [at that time] obtained a certificate of need. Plaintiff's Exhibit 23. However, Judge Collins was not present at this meeting.

After a resultant lull in the negotiations with St. Jude and Liljeberg, during which time several proposals were considered, activity resumed on September 25, 1981, when the Real Estate Committee reported that a new hospital had been approved for the Kenner area and that the group receiving the approval was not HCA who had been negotiating with Loyola. Plaintiff's Exhibit 24.

Thereafter, on or about October 29, 1981, the Board was apprised of renewed activity regarding construction of a hospital on the Monroe Tract in a document entitled "Real Estate Matters" bearing Agenda item D-2, which was mailed to all Board members, including Judge Collins, for their consideration at the November 12, 1981 Board meeting. See Eckholdt Deposition, p. 70. This document contained the following pertinent statements:

> There has been a significant change in direction concerning the new hospital to be built in the City of Kenner. Loyola's property, more specifically the Monroe Tract, has again become a prime location, and there have been some preliminary negotiations with the developers.

Plaintiff's Exhibit 26.[4]

At the very next meeting held on November 12, 1981, there was speculation that a hospital in the vicinity of Loyola's land could be a significant investment factor, if the development of the hospital and surrounding acreage were kept under control. Upon recommendation of the Real Estate Committee, the Board unanimously approved a Resolution calling for the resumption of negotiations with the St. Jude group:

> That the Vice-President [for Business and Finance] be authorized to continue negotiations with the developers of the St. Jude Hospital, the purpose of which is to sell an amount of acreage not to exceed 75 acres between 35th Street and 40th Street (Vintage Drive) on the Monroe Tract, and to have the property between 35th Street and 40th Street

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[4] Also sent in advance of the November 12, 1981 Board meeting was a verbatim copy of the resolution quoted above, authorizing the Vice President to continue negotiations with the developers of the St. Jude Hospital, which was subsequently adopted by unanimous vote at the November meeting. Plaintiff's Exhibit 27.

> rezoned in a more favorable manner to the University . . .

Plaintiff's Exhibit 25, Eckholdt Deposition Exhibit E-22.

The connection between the rezoning of Loyola's land and the St. Jude project was also discussed with the Board, Eckholdt Deposition, p. 68, as was rezoning of Loyola's land as a condition of sale to Liljeberg. *Id.* at pp. 68-69. Judge Collins was present at this November 12, 1981 meeting.

The January 28, 1982 minutes of the Loyola University Board of Trustees also discuss the St. Jude Hospital Project:

> Regarding the negotiations with the St. Jude Hospital Corporation, Mr. Eckholdt reported that the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation. If negotiations are brought to a satisfactory conclusion, there is a great likelihood that there will be a major hospital built on the university's property . . . .

Plaintiff's Exhibit 28. Judge Collins was not present at this meeting.

Judge Collins learned of Loyola's interest after the judgment of March 12, 1982, through three different communications received by him from various Loyola representatives. See Judge Collins' Deposition, p. 15.

The first communication received was a booklet containing an agenda of a Loyola Board meeting, for a meeting to be held on March 25, 1982, and the minutes of the January 28, 1982 Board meeting. See *id.* at p. 9; Plaintiff's Exhibit 11 and Deposition Exhibit E-28.[5] The Judge did not recall the precise date he received this

[5] Also labelled as Plaintiff's Exhibit 28.

agenda and the minutes, but they were sent under cover of a letter dated March 12, 1982. See Judge Collins' Deposition at pp. 15-16. In this regard, the Judge further testified, and this Court therefore finds, that during his six year term on the Board of Trustees, from 1977 through 1983, Judge Collins customarily received such communications from Loyola two to three days after the date of the communication, but did not look over the communications until shortly before the meeting to which the agenda would pertain. *Id.* at pp. 16, 17. The Court therefore concludes that Judge Collins did *not* have actual knowledge of Loyola's sale to Liljeberg from this communication prior to March 24, 1982, but that he did have such actual knowledge as of March 24, 1982.[6]

Judge Collins obtained further knowledge of Loyola's involvement in the Liljeberg sale from a letter or memorandum dated March 12, 1982, from Thomas Clancey, S.J., to the members of the Board, which letter he received a couple of days following March 15, 1982. See *id.* at p. 12; Deposition Exhibit E-30.[7] This letter notified all Board members that the Loyola Executive Committee had met on March 11, 1982 for the purpose of preparing an agenda for the March 25 Board meeting and had unanimously approved the sale of eighty acres in the Loyola tract to Liljeberg. See Judge Collins' Deposition, pp. 12-13.

On or about March 21, 1982, the Judge received another letter dated March 19, 1982, from Mr. Eckholdt, which letter contained further information regarding the Loyola sale to Liljeberg:

> Loyola University has entered into an agreement to sell approximately 80 acres in the Monroe Tract

[6] In fact, the parties memoranda show agreement that Judge Collins had such actual knowledge on March 24, 1982.

[7] Also labelled Plaintiff's Exhibit 30.

> to John A. Liljeberg, Jr. Loyola will net approximately $6,694,000, or $1.90 per square foot. In addition, Loyola Drive will be extended 3,290 linear feet at no cost to Loyola and Loyola's remaining acreage south of Vintage Drive will be rezoned in a manner more favorable to Loyola. Mr. Liljeberg's development will include a 200-bed hospital, auxiliary support services, medical offices, etc., and a 25 acre development of luxury condominiums. I will give a full report at our next meeting, but please call if you should want any further details.

Deposition Exhibit E-31;[8] see also Judge Collins' Deposition, pp. 14-15.

With regard to the latter two communications, Judge Collins testified, and this Court therefore finds, that he also placed these communications aside, together with the booklet mentioned above, and pursuant to his customary preparation for the Loyola meetings, did not review these materials until shortly prior to March 25, 1982. See *id.* at pp. 18-19.

In sum, materials were received by Judge Collins, from which he could have obtained actual knowledge of the sale of the Loyola tract to Liljeberg on March 14-15, 1982. See *id.* at p. 22. However, the Court finds that in light of the Judge's usual practice of not reviewing materials until shortly before the meeting to which they pertained and the absence of any unusual circumstances calling for a departure from such practice, Judge Collins did not obtain actual knowledge of the Loyola sale until no earlier than March 24, 1982 but no later than March 25, 1982. Thus, Judge Collins had no *actual* knowledge

[8] This letter was delivered to Judge Collins marked "Personal and Confidential." Nonetheless, Judge Collins testified and this Court therefore finds that the letter was not immediately opened and read by him, particularly in light of his testimony that he was "virtually inundated" by paper.

of Loyola's involvement in the Liljeberg purchase until after entry of final judgment, although he did have such actual knowledge within ten days of entry of the final judgment. The Court accepts Judge Collins' statement that at the time he tried the case and prepared his judgment, despite all the prior discussions at board meetings and communications, he did not recollect either Loyola's involvement or that the University could be affected by his decision. Lastly, the Court finds the extent of his *actual* knowledge during the time he controlled the case is reflected in the three documents described above and placed in the record of these proceedings as exhibits to Judge Collins' deposition.

However, the Court cannot end its inquiry into Judge Collins' actual knowledge here, without making the further crucial determination whether, at the time of Judge Collins' actual knowledge, Loyola had any significant interest in the outcome of the Liljeberg/HSA litigation. In making this determination, the Agreement to Purchase and Sell, together with subsequent amendments, is critical.[9]

The Agreement to Purchase or Sell dated March 19, 1982, Exhibit 14, provides in pertinent part as follows:

> 14. The parties hereto take cognizance of certain litigation pending in the U.S. District Court for the Eastern District of Louisiana between Purchaser [John A. Liljeberg, Jr., President, Axel Realty, Inc.] and third parties involving the obtaining by Purchaser of a Certificate of Need from the U.S. Department of Health and Human Services and/or the

[9] The Court therefore overrules defendant's objections to Plaintiff's Exhibits 14-18; they are most certainly relevant to the issue of Judge Collins' actual knowledge of Loyola's interest in the outcome of the suit because, as will appear above, the exhibits indicate whether and to what extent Loyola had an interest in the outcome of the case.

> State of Louisiana for the construction of St. Jude Hospital of Kenner under Section 1122, and in that regard, it is hereby agreed that this sale *shall not be in any way conditioned* upon the success of Purchaser in that litigation or the obtaining of a final judgment favorable to Purchaser therein . . . .

Exhibit 14, pp. 6-7 (emphasis added). The Agreement further provides:

> 19. It is recognized by both parties that the primary purpoee that the Seller has agreed to in this sale is to have a hospital constructed on the property to be sold, and that John A. Liljeberg, Jr. represents that either he and/or St. Jude Hospital of Kenner, Louisiana is the owner of #1122 Certificate of Need which was issued on August 26, 1981. Therefore, if Purchaser, or its successors or assigns, has not executed a construction contract for the construction of at least a 200-bed hospital on the land within one year following the Act of Sale contemplated herein, Seller shall have the right to repurchase the land for $6,694,629.00 plus the actual cost expended by Purchaser for landfill, roadway preparation, construction of the 3,290 linear foot Loyola Drive extension plus any interest on funds borrowed to finance said costs. This option may be exercised only during the thirty-day period immediately following the one-year period mentioned in this paragraph by so notifying Purchaser in writing . . . .

Id. at p. 8. In Paragraph 7, however, it is further provided,

> 7. Prior to the passage of the Act of Sale, the Purchaser shall attempt to have the City of Kenner change the zoning classification of certain land in accordance with the attached plan identified as Exhibit "B" which is made part of this agreement. Seller shall lend its cooperation and assist Purchaser in accomplishing this condition at no expense to Seller. The desired zoning change provided in this paragraph shall be at Purchaser's sole cost and expense.
>
> . . .
>
> If, *for any reason*, the zoning change contemplated by this paragraph cannot be accomplished prior to the date fixed for the Act of Sale, this entire agreement shall become null and void and Seller shall return to Purchaser its deposit, and neither party shall have any further responsibility to the other.
>
> (Emphasis added.)

These contractual provisions raise the issues whether Loyola had any interest in the outcome of the case at the time when Judge Collins had both actual knowledge of the Loyola sale and control over the outcome of the case. The Court concludes, however, that as of March 19, 1982, Loyola's interest in the case terminated, because the Act of Sale was no longer even arguably conditioned in any way upon the ownership of the certificate of need, and thus the outcome of the case. Loyola's option to repurchase the property at a profit to Loyola or for any other reason further confirms this conclusion and militates against any concern that Liljeberg's ownership of the certificate would affect the sale and therefore affect Loyola, either by controlling Liljeberg's ability to obtain financing for the property[10] or by controlling Liljeberg's ability to obtain necessary zoning changes and thereby delay his taking title until such time as he obtained a final judgment in his favor. Contrary to the contentions made in HSA's supplemental memorandum, the actual value to Loyola of Liljeberg's achieving zon-

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[10] The Court has assumed that for a loan of this magnitude, the stock of St. Jude and thus the certificate might be pledged as security.

ing changes for the benefit of its retained property is purely speculative and does not demonstrate any significant interest on Loyola's part in the outcome of the case after March 19, 1982.

The Court further finds that the Act of Sale was passed on March 15, 1983.[11] Thus, there can be no inference drawn that the parties in any way improperly delayed the passing of title until such time as the judgment herein was final. By that time, the Fifth Circuit's affirmance of Judge Collins' decision had been of record for four months, having been entered November 11, 1982.

In sum, Judge Collins did not have actual knowledge of Loyola's potential interest in the HSA/Liljeberg controversy until March 24, 1982; by that time, Loyola had no actual interest in the outcome of the case.

As indicated above, the preceding findings pertain to this Court's role on remand to determine Judge Collins' actual knowledge. In light of the Fifth Circuit's express concern regarding the potential for appearance of impropriety, however, the Court now makes the following additional findings regarding the circumstances surrounding Judge Collins' service on the Loyola Board and the negotiations with Liljeberg for the sale to him of a portion of the Monroe Tract.

Thus, in addition to previous recitations of Judge Collins' involvement in the affairs of Loyola and the manner in which the Board communicated information to its members, the Court also finds that during the dates of Judge Collins' service on the Loyola Board, the business of the Board was conducted by committee. See Judge Collins' Deposition, p. 23. See also Deposition of Mr. Eckholdt, p. 20; Deposition of Moise Steeg, pp. 15-16. The two committees directly concerned with real es-

[11] See Exhibit 32, bearing Entry No. 8308983, Parish of Jefferson.

tate transactions conducted on behalf of Loyola were the Real Estate Committee and the Executive Committee. See Judge Collins' Deposition, p. 23; Eckholdt Deposition, pp. 21-22. The Real Estate Committee made recommendations regarding action to be taken by the University. Eckholdt Deposition, pp. 22-23. Judge Collins served on neither of those committees, although he served on the Student Affairs Committee, Board By-laws Committee and Presidential Evaluation Committee. Judge Collins' Deposition, pp. 23, 25 & 26.

Thus, in making its alternate factual findings, the Court has considered whether by virtue of his membership on the Board, Judge Collins would have been privy to any of the negotiations in question, either by receipt of minutes or agendae of meetings in which such matters were discussed, access to files in which such matters are reflected or access to meetings in which such matters may have been discussed, regardless of the Judge's actual recollection or knowledge regarding the negotiations in question.[12]

Upon review of the record, the Court finds the minutes attached to Judge Collins' deposition and his testimony regarding same more than amply provide a basis for imputing knowledge to him of Loyola's potential interest in this litigation. Specifically, the record reflects that the Judge had actual knowledge that Loyola owned the tract in question and was attempting to sell it prior to the receipt of the March 1982 documents. See Judge

[12] The Court finds that due to Judge Collins' attendance at meetings in which the sale to Liljeberg was discussed, he had actual knowledge of Loyola's potential interest at the time of those meetings, on January 24, 1980 and September 25, 1981, both of which occurred prior to this litigation. See Steeg Deposition, pp. 27 & 36. However, due to his lack of recollection, Judge Collins did not have such actual knowledge on January 21-22, 1982 and at times thereafter, while he controlled the outcome of the case. See text prior to note 9 *supra*.

Collins' Deposition, pp. 28-29. The minutes of the Board meeting of January 24, 1980, more than one year prior to the filing of this suit and two years prior to the trial of this matter before Judge Collins, reflect both the Judge's presence at that meeting and a report by the Real Estate Committee discussing possible negotiations with Liljeberg [13] and the importance of a certificate for the contemplated hospital. See *id.*; Exhibit E-8. As previously noted, use of the tract was discussed at the September 25, 1981 Board meeting attended by the Judge, see Judge Collins' Deposition, E-21, and at a subsequent meeting in November 1981, see E-22. See also Steeg Deposition, pp. 27, 36 & 38. Moreover, the minutes of the November 1981 meeting show specific approval of continuing negotiations with "the developers of the St. Jude Hospital."

The Judge testified and this Court has found that Judge Collins did not have any actual recollection of the numerous individuals with whom Loyola was negotiating for sale of the tract. See Deposition of Judge Collins, pp. 35, 43, 44.[14] The Court nevertheless finds that there was available to the Judge information regarding the sale of the Monroe tract and the fact of Loyola's negotiations with Liljeberg, and more significantly, the import of the ownership of the certificate to Loyola. Thus, even though Judge Collins would have recused himself upon any questioning of his impartiality, see *id.* at p. 36, the availability of such information to him as a Board member and his involvement in routine meetings and recommendations involving same are sufficient to charge him with constructive knowledge of the sale to Liljeberg and the sale's potentially favorable impact on other Loyola property, assuming Liljeberg would

[13] Mr. Eckholdt first met with Liljeberg to discuss the St. Jude project in November 1979. See Eckholdt Deposition, p. 25.

[14] See also note 12 *supra*.

construct the St. Jude Hospital on that tract if the certificate of need was at his disposal.

Conclusions of Law

This Court has jurisdiction of this matter under 28 U.S.C. §§ 1332 and 2201 and by virtue of the Fifth Circuit's remand to this Court.

The Court is bound by the law of the case as set forth in the Fifth Circuit's opinion herein dated October 30, 1984, requiring an inquiry into Judge Collins' actual knowledge of Loyola's interest in the transactions between Liljeberg and HSA. This inquiry arises under 28 U.S.C. § 455(a), which provides in pertinent part, "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". The Fifth Circuit was further concerned with whether Judge Collins should disqualify himself under section 455(b)(4), which provides in pertinent part:

> [A judge] shall also disqualify himself in the following circumstances:
>
> . . .
>
> He knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

As indicated by the Fifth Circuit, the pertinent inquiry under section 455(b)(4) is whether Judge Collins might have "another interest that could be substantially affected by the outcome of the proceeding", by virtue of his position as a Board member during the pendency of this lawsuit and his corresponding participation in de-

cision making and recommendations affecting matters coming before the Board.

Accordingly, the Court holds that Judge Collins gained actual knowledge of the Liljeberg/Loyola transaction between March 24 and March 25, 1982 during the time he controlled the outcome of this case, but by March 19, 1982, Loyola had no significant interest in the outcome of the Liljeberg/HSA controversy. Specifically, in light of the entry of judgment on March 16, 1982, Judge Collins could have granted a new trial or amended his factual findings on or before March 26, 1982, by which time he had actual knowledge of the Loyola/Liljeberg transaction. See Fed. R. Civ. Pro. Rules 52 and 59. Notice of Appeal divesting the District Court of jurisdiction over the matter was not filed until April 8, 1982. However, by reason of the March 19, 1982 firm agreement with the Liljeberg interests to purchase, Loyola had no significant interest in the outcome of the HSA/Liljeberg litigation. Thus, Judge Collins did not have "any other interest" in the HSA/Liljeberg controversy under section 455(b)(4) after March 19, 1982 and had no actual knowledge of his ability as judge to take action affecting that interest prior to that time. Accordingly, recusal would not be mandated by Judge Collins' actual knowledge.

In its remand to this Court, the Fifth Circuit also emphasized the recusal statute's focus upon the appearance of impartiality. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 20 (1980):

> Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence and fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all of the circumstances, would harbor doubts as to the judge's impartiality.

See also Hall v. Small Business Admin., 695 F.2d 175 (5th Cir. 1983); *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir. 1983). This Court would conclude that the existence of Judge Collins' unperceived interest in the outcome of the proceeding, as defined by § 455(b)(4) and the communications received, oral reports imparted and the availability of information regarding Loyola's interest in the outcome of the case prior to March 19, 1982 create an appearance of partiality sufficient to impute constructive knowledge of the importance to Loyola of the use of the property for the purpose of building a hospital. However, the Court does not read the Fifth Circuit's mandate as requiring recusal upon such conditions and accordingly determines that recusal is not dictated by such constructive knowledge.[18]

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[18] In memoranda, the parties also briefed the affect of any legal determination this Court might make regarding the appearance of impropriety. Defendant contends that an appearance of impropriety requires merely prospective recusal, counting from the time the issue was raised before the Court, citing *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). Plaintiff contends any appearance of partiality requires Judge Collins' decision be vacated. It appears from the memoranda and the letters of counsel dated October 7, 1985 and October 10, 1985 that the dispute centers around the effect of recusal under § 455(a). These arguments are rendered moot by the Court's determination that Judge Collins' recusal is not necessary. The Fifth Circuit also discussed at length possible recusal under § 455(b)(4). Accordingly, the Court will not address these arguments, even though the Fifth Circuit opinion does not offer any specific guidance as to the intended effect of any finding by this Court requiring recusal.

CONCLUSION

For the foregoing reasons, the Court concludes that Judge Collins did not have any actual knowledge requiring his recusal herein. Accordingly, Judge Collins' denial of the motion to recuse is hereby affirmed.

New Orleans, Louisiana this 27th day of December, 1985.

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714 SECTION "A"

HEALTH SERVICES ACQUISITION CORP.

versus

JOHN A. LILJEBERG, JR.

[Filed Jan. 16, 1986]

AMENDED ORDER

The Court, having granted the motion of plaintiff to amend the Order entered herein on December 30, 1985, accordingly;

IT IS ORDERED, that the Court's Order entered herein on December 30, 1985, be and it is hereby AMENDED as follows:

> "IT IS ORDERED, that Health Services Acquisition Corp.'s Motion to Vacate Judgment and Reallot for New Trial is hereby denied."

New Orleans, Louisiana, this 15th day of January, 1986.

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3069

D.C. Docket No. CA-81-4714-A
HEALTH SERVICES ACQUISITION CORP.,
Plaintiff-Appellant,

versus

JOHN A. LILJEBERG, JR.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, GARZA, and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the original judgment of the District Court is vacated, and the supplemental order of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

August 13, 1986

Issued as Mandate: Sep. 19, 1986 OP-JDT-11

A true copy
Test:

GILBERT F. GANUCHEAU
Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ Joan Perkins
Deputy
New Orleans, Louisiana

Dec. 1, 1986

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-3069

HEALTH SERVICES ACQUISITION CORP.,
Plaintiff-Appellant,

versus

JOHN A. LILJEBERG, JR.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8-13-86, 5 Cir., 198—, —— F.2d ——)

(September 9, 1986)

Before CLARK, Chief Judge, and GARZA and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voting in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-3657

HEALTH SERVICES ACQUISITION CORPORATION,
Plaintiff-Appellant,

versus

JOHN A. LILJEBERG, JR.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 30, 1984)

Before GEE, REAVLEY and DAVIS, Circuit Judges.

PER CURIAM: *

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This is an appeal from Judge Robert F. Collins's denial of a motion to vacate a judgment rendered on March 12, 1982 and to recuse himself from further proceedings on the matter. Health Services Acquisition Corp. ("HSAC"), against which judgment was rendered, now seeks to have the judgment vacated and the cause transferred to another judge, on grounds that Judge Collins was at the time of trial a trustee of Loyola University, which had an interest in the outcome of the suit. We reverse and remand.

Judge Collins presided over the trial of this case, which took place in January 1982. The primary issue at trial was whether a warranty and indemnity agreement between Liljeberg and the predecessor in interest of HSAC [1] transferred ownership of a corporation named St. Jude Hospital of Kenner, Louisiana, Inc., from Liljeberg to HSAC. This corporation had been given approval by the state to construct a hospital.

Immediately after all evidence had been presented and the parties rested, Judge Collins summarized his impressions about the case, stating:

> I come away with the firm conviction and conclusion that by no stretch of the imagination could you call this Warranty and Indemnity Agreement a document which transfers ownership of St. Jude Hospital of Kenner, La. from Mr. Liljeberg to HAI . . . . (Tr. p. 277)
>
> So, in sum and substance, the Court will issue an opinion on this, of course, but I think it would be unfair to keep the parties in doubt as to how I feel about the case. But there is no doubt in my mind as to what the situation is here . . . . (Tr. p. 278)

This oral deliverance took place on January 22, 1982. On March 12, 1982, Judge Collins rendered judgment and

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[1] The warranty and indemnity agreement was executed between Liljeberg and Hospital Affiliates International, HSAC's predecessor.

handed down an opinion dismissing HSAC's cause of action and declaring Liljeberg the owner of St. Jude.

While the dispute was pending, Loyola University had been conducting negotiations with Liljeberg for the sale of certain lands owned by Loyola for the purpose of building St. Jude Hospital. The University's board of trustees conjectured in its minutes of November 12, 1982, that, as a result of Loyola's sale of land to Liljeberg, the market value of the University's investment portfolio would increase significantly.[2] The land itself sold to Liljeberg for more than six million dollars. If HSAC had been declared the owner of St. Jude, Loyola would not have had an opportunity to sell any land to HSAC, which had already purchased another tract on which to build the hospital. It transpires that Judge Collins had been a member of Loyola University's board of trustees since about 1978.

On August 17, 1983, HSAC learned of Judge Collins's connection with Loyola, and filed a motion to vacate and reverse. Denying HSAC's motion to vacate, Judge Collins cited three reasons for not vacating judgment and recusing himself:

> First, Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy. Second, Loyola University is a non-profit, educational institution, and any benefits insuring [sic] to that institution would not benefit any individual personally. Finally, and most significantly, this Judge never served on either the Real Estate or Executive Committee of the Loyola University Board of Trustees. Thus, this Judge had no participation of any kind in negotiating Loyola University's real estate transactions and, in fact, had no knowledge of such transactions.

Record Excerpts at 3.

[2] John L. Eckholdt, Loyola's Vice-President for Business and Finance, testified that board minutes are routinely circulated to all members of the board of trustees.

The federal recusal statute contains two provisions that might apply to the problem at hand, both couched in mandatory terms. The first provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a) (1982). Though the determination is often, in the end, a judgment call, section 455(a) "sets up an objective standard, rather than the subjective standard set forth in the prior statute through the use of the phrase 'in his opinion.'" *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). Moreover, "[u]se of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Id.*

The second provision contains more specific guidelines:

> He shall also disqualify himself in the following circumstances:
>
> . . .
>
> He knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4) (1982).

The issue of judicial disqualification is solely one of law. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir. 1983). It is "a sensitive question of assessing all the facts and circumstances in order to

determine whether the failure to disqualify was an abuse of sound judicial discretion." H. Rep. No. 1453, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6355. "[T]he goal of the judicial disqualification statute is to foster the *appearance* of impartiality." *Postashnick*, 609 F.2d at 1111 (emphasis in original).

Wright and Miller have observed that "[t]here should be no room in this context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner . . . . Failure of a judge to step aside if he is disqualified under one of the . . . statutes should always require reversal." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3553 (1975).

Finally, it is worth noting that, although HSAC did not lodge the objection to Judge Collins' hearing this case until long after it had concluded, its motion is timely, because HSAC did not learn of the judge's trusteeship until after trial. *See Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

The question of knowledge—the extent of it and when it was acquired—is crucial to the resolution of this case. Section 455(b)(4), which might be read as a *per se* indicia of the general 455(a) rule, mandates recusal if the judge *knows* he, as a fiduciary or otherwise, has an interest that might be substantially affected by the outcome of the proceeding.[3] At this stage, the record does

[3] We are of the opinion that, to the extent that the judge might have an interest on behalf of Loyola University, that interest does not fall under the *per se* financial interest rule. Rather, the fiduciary interest here is exempted from being a financial interest under 28 U.S.C. § 455(d)(4)(ii) (1982), which creates an exception that "[a]n office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization." Hence, any interest Judge Collins might have would be an "other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4) (1982).

not reflect exactly when Judge Collins learned of Loyola's interest, though he stated in his order that he "had no participation of any kind in negotiating Loyola University's real estate transactions and, in fact, had no knowledge of such transactions." This statement undoubtedly is true, and we do not doubt the utter probity with which it was drafted; but it does not spell out with great enough specificity the temporal relation between his learning of Loyola's interest and the final rendering of judgment.

Liljeberg notes that Judge Collins clearly stated his strong predilections—even to the extent of ruling orally from the bench—long before judgment was actually rendered. We must reject this argument; we cannot consider such factors, for the disposition of the case was still *in pectore judicis*. As Judge Rubin of this circuit has so cogently stated in a similar case:

> The judge's assertion that he had made up his mind immediately after hearing the case . . . is immaterial. Every judge has suffered a change of heart after reaching a tentative decision. Much might happen during research and opinion writing to affect the decision. Until the decision was signed and rendered, it was *in pectore judicis*, subject to possible influence.

Hall v. Small Business Administration, 695 F.2d 175, 180 (5th Cir. 1983). Hence we cannot consider Judge Collins's oral statement from the bench. The date to be ascertained is the one on which Judge Collins became aware of Loyola University's significant interest in the disposition of the suit. Whether this awareness came about before or after the date of final judgment, the record does not indicate.

Therefore, we must remand this cause to the district court, to be assigned to a judge other than Judge Collins, so that the court may determine precisely when Judge

Collins learned of Loyola's interest. This disposition is not to suggest in any way that we think that there is or was any open issue about the impartiality of Judge Collins. It is, rather, an acknowledgment that the judiciary must be governed by the appearance, as well as the reality, of disinterested adjudication. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3657

HEALTH SERVICES ACQUISITION CORP.,
Plaintiff-Appellant,

versus

JOHN A. LILJEBERG, JR.,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITIONS FOR REHEARING

(November 26, 1984)

Before GEE, REAVLEY and DAVIS, Circuit Judges.

PER CURIAM:

The remand to the district court is unlimited. The district court is to proceed consistently with this court's opinion. The petitions for rehearing are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX F

[related case]

MINUTE ENTRY December 9, 1983 COLLINS, J.

Civil Action No. 81-4714

SECTION "C" (3)

HEALTH SERVICES ACQUISITION CORP.

versus

JOHN A. LILJEBERG, JR.

[Filed Dec. 9, 1983]

This matter is before the Court on motion to vacate judgment, filed by counsel for the plaintiff, Health Services Acquisition Corp. (HSAC). Plaintiff asserts that this Judge had the duty to recuse himself from the above captioned matter, pursuant to 28 U.S.C. § 455(b)(4). The plaintiff further asserts that the failure of this Judge to recuse himself is grounds to vacate, under Fed. R. Civ. P. Rule 60(b)(6), the final judgment entered in this case nearly two years ago. The Court rejects plaintiff's assertions.

In 1981, defendant, John A. Liljeberg, Jr., applied for a Section 1122 Certificate of Need to be used to further the construction of a hospital that Liljeberg planned to build. The Certificate was issued on August 26, 1981,

to St. Jude Hospital of Kenner, Louisiana, Inc. (St. Jude).

On November 30, 1981, HSAC filed this suit (*St. Jude I*) against Liljeberg. HSAC alleged ownership of St. Jude and, therefore, sought control over the Certificate of Need. On January 11, 1982, after a two-day trial on the merits, this Judge, ruling from the bench, granted judgment in favor of defendant and declared him to be the sole owner of St. Jude. On March 12, 1982, written reasons for the judgment were entered into the record. On October 18, 1982, the Fifth Circuit affirmed this Court's decision in *St. Jude I*. No writ of certiorari was requested from the Supreme Court, thus the judgment is final.

Many of the same issues involved in *St. Jude I*, plus a few new ones, were raised again in another suit (*St. Jude II*) originally filed by HSAC in the Middle District of Louisiana. In that suit, St. Jude and various federal and state agencies were named as defendants. Judge Parker transferred *St. Jude II* to this Court, where it is presently pending as "Health Services Acquisition Corp. v. Roger P. Guissinger, et al.," C.A. No. 83-3031, Sec. "C". HSAC recently filed a motion to have this Judge recuse himself from *St. Jude II*, based on 28 U.S.C. § 455(a) and (b)(4), because of his former membership on the Board of Trustees of Loyola University. This Court refused the recusal request in *St. Jude II* on September 14, 1983. On October 25, 1982, the Fifth Circuit denied HSAC's petition for writ of mandamus to this Court, by which HSAC sought to compel recusal.

Underlying the present motions to vacate is another assertion by HSAC that this Judge should recuse himself from the entire St. Jude matter because of his former Loyola trusteeship. The only difference between HSAC's first recusal request, which this Court rejected in *St. Jude II*, and this second recusal request, which is brought in the form of a motion to vacate, is a different time

frame. However, the time change is a difference without a distinction.

Three of the four primary reasons behind this Court's rejection of the recusal request in *St. Jude II* apply with equal force in this Court's rejection of the present motion to vacate.[1] First, Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy. Second, Loyola University is a non-profit, educational institution, and any benefits insuring to that institution would not benefit any individual personally. Finally, and most significantly, this Judge never served on either the Real Estate or Executive Committees of the Loyola University Board of Trustees. Thus, this Judge had no participation of any kind in negotiating Loyola University's real estate transactions and, in fact, had no knowledge of such transactions.

From the above, it is clear that because both subjective and objective impartiality were assured, recusal was not mandated.[2] Therefore, the judgment should not and will not be vacated.[3] Accordingly, the Court will DENY plaintiff's motion to vacate.

/s/ Robert F. Collins
United States District Judge

---

[1] *See* this Court's October 4, 1983 Minute Entry in *St. Jude II* (C.A. #83-3031) at pp. 7-8.

[2] For a more detailed discussion of the applicable legal test, which this Court must use in determining if recusal was mandated, see *id.* at pp. 3-6.

[3] Because the facts do not mandate recusal, this Court finds it unnecessary to reach the question of the applicability of Rule 60 of the Fed. R. Civ. P. as authority for this Court's vacation of the final judgment previously rendered herein.

APPENDIX G

MINUTE ENTRY October 4, 1983 COLLINS, J.

Civil Action No. 83-3031

SECTION "C"

HEALTH SERVICES ACQUISITION CORPORATION

versus

ROGER P. GUISSINGER, *et al.*

[Filed Oct. 7, 1983]

This matter came before the Court on September 14, 1983 at 9:00 a.m., on motion of counsel for the plaintiff, Health Services Acquisition Corporation (HSAC), seeking disqualification of this Judge, pursuant to 28 U.S.C. § 455(a) and (b)(4). HSAC asserts the § 455(b)(4) requires this Judge to disqualify himself because he is a former member of the Board of Trustees of Loyola University, and in this fiduciary capacity has a financial interest in the subject matter in controversy or other interest that might be substantially affected by the outcome of the present proceedings pending before him. Alternatively, HSCA argues that this Judge should disqualify himself because his impartiality might reasonably be questioned, again due to his former relationship with Loyola University.

I. BACKGROUND

In 1981, John A. Liljeberg, Jr., (Liljeberg), applied for a Section 1122 Certificate of Need (Certificate) to be used in conjunction with a hospital Liljeberg planned to build in Kenner, Louisiana. The Certificate was issued to St. Jude Hospital of Kenner, La., Inc. (St. Jude) on August 26, 1981.

On November 30, 1981, HSAC filed suit against Liljeberg to obtain control of the Certificate and to have itself declared the owner of St. Jude. This matter was entitled "Health Services Acquisition Corporation vs. John A. Liljeberg, Jr.," Civil Action No. 81-4714, Section "C," and was tried in this Court before this Judge. On January 22, 1982, after a two day trial on the merits, this Judge ruled from the bench and, subsequently, entered judgment on March 12, 1982, in favor of St. Jude and against HSAC, by declaring Liljeberg to be the sole owner of St. Jude.

This decision was affirmed by the United States Fifth Circuit Court of Appeals on October 18, 1982. Certiorari was not requested of the United States Supreme Court. Accordingly, that judgment is final.

On January 31, 1983, HSAC brought this action in the United States District Court for the Middle District of Louisiana against St. Jude and various Federal and State agencies and administrators, alleging that the Certificate was improperly issued in the name of St. Jude and that HSAC is entitled to receive the Certificate. On June 13, 1983, the Honorable John V. Parker, Chief Judge of the Middle District of Louisiana, transferred this matter to this Court because, *inter alia*, he believed this Judge to be more familiar with the subject matter of the suit.

Once again, HSAC is before this Court. HSAC now seeks to have this Judge disqualify himself for the reason that he has too great a financial or other interest in this

litigation to remain impartial and, alternatively, that his impartiality might reasonably be questioned.

II. LEGAL TEST FOR DISQUALIFICATION

The disqualification and recusal of federal judges are governed by 28 U.S.C. §§ 144 and 455. Section 144 provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Section 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> . . .
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by this outcome of the proceeding;
>
> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> . . .
>
> (3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

These two provisions are to be construed *in para materia* and, therefore, the applicable standard for determining the propriety of judicial disqualification for bias, prejudice, or partiality is the same under either code section. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980). *But see Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1167 (5th Cir. 1980) (indicating minor, and for present purposes irrelevant, distinction between the two sections). Both statutes are based on the notion that a fair trial before an unbiased judge is a basic requirement of due process. *United States v. Will*, 449 U.S. 206 (1980). A recusal motion under both code sections is committed to the sound discretion of the district judge and will be overturned only upon a showing of abuse of that discretion. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1107 (5th Cir. 1981); *United States ex rel Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir.), *cert. denied*, 434 U.S. 1035 (1977).

The applicable legal test, which this Court must use in determining if disqualification is mandated, requires that judicial impartiality be measured against both subjective and objective standards. The subjective standard requires introspection by the challenged judge, and a resulting determination that he believes himself to be impartial and capable of remaining so throughout the proceedings. The objective standard asks whether a reasonable person, knowing all the circumstances, would harbor doubts about the challenged judge's impartiality. In other words, the subjective standard requires *actual* judicial impartiality, while the objective standard requires the *appearance* of judicial impartiality.

III. APPLYING THE LEGAL TEST TO THE FACTS

A. *The Subjective Standard*

Upon careful and thorough consideration of all the surrounding circumstances, and after thoughtful introspection, this Judge concludes that he is unbiased, unprejudiced, and impartial, and is capable of remaining so throughout these proceedings. Therefore, this Judge sees no subjective reason for disqualifying himself, as his actual judicial impartiality is assured.

B. *The Objective Standard*

HSAC's sole argument in favor of this Judge's disqualification is that he formerly served in a fiduciary capacity as a member of the Board of Trustees of Loyola University, and that institution's interests could be substantially affected by the outcome of this case. Loyola University's interest could be affected because it once owned the real estate on which St. Jude is presently constructing its hospital and presently owns additional surrounding lands, the value of which could be affected if the hospital were not completed on the present site.

The facts simply do not mandate disqualification of this Judge for having an interest in either the controversy or a party thereto, or for failing to foster the appearance of judicial impartiality. First, Loyola University is not a party to this litigation. Nor is any real estate the subject matter of this controversy. Second, Loyola University is a non-profit, educational institution, and any benefits issuing to that institution would not benefit any individual personally. Third, this Judge has no present relationship with Loyola University. His term as trustee expired on May 26, 1983, and the case was not transferred to this Judge from the Middle District of Louisiana until June 13, 1983. Finally, this Judge never served on either the Real Estate or Executive Committees

of the Board of Trustees. Therefore, this Judge had no participation whatsoever in negotiating Loyola University's real estate transactions. Thus, it is clear that this Judge has no financial or other interest in any aspect of this litigation. It is equally clear that reasonable people could harbor no doubts about this Judge's impartiality.[1] A contrary view would require this Judge's disqualification from every proceeding involving virtually any individual or entity doing or ever having done business with Loyola University, because such business necessarily would affect the institution. Obviously, Congress did not intend such ludicrous results when it adopted §§ 144 and 455.

IV. CONCLUSION

There being no subjective or objective reason supporting disqualification, and with actual judicial impartiality, and even its appearance being assured, this Court concludes that this Judge should not and will not disqualify himself from this matter. Accordingly, the Court will DENY plaintiff's motion for disqualification.

/s/ Robert F. Collins
United States District Judge

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[1] In fact, on September 6, 1983, in an attempt to further promote the appearance of impartiality, this Court ordered the Clerk of Court to reallot this case, temporarily, to another Judge in this district, for the purpose of hearing this motion. However, the Judge receiving this case on temporary reallotment felt that the challenged Judge was in the best position to gauge his own impartiality. Accordingly, on September 13, 1983, this Court rescinded its Order of temporary reallotment and subsequently heard this motion to disqualify.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3240

HEALTH SERVICES AQUISITION CORP.,
Plaintiff-Appellant,
Cross-Appellee,

versus

JOHN A. LILJEBERG, JR.,
Defendant-Appellee
Cross-Appellant,

versus

HOSPITAL CORPORATION OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

(October 18, 1982)

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge.

Health Services Acquisition Corporation appeals from the judgment of the district court finding that it was not the owner of St. Jude Hospital of Kenner, Inc. John A. Liljeberg cross-appeals from the district court's denial of certain injunctive relief. We affirm.

John A. Liljeberg, a pharmicist, is the sole incorporator of St. Jude Hospital of Kenner, Inc. (St. Jude). He has worked since 1976 to secure a full service hospital for the City of Kenner, which is located on the outskirts of New Orleans. Liljeberg incorporated St. Jude on October 3, 1979, for the purpose of applying for a "Certificate of Need" from the State of Louisiana pursuant to Section 1122 of the Social Security Act.[1] Liljeberg has since paid all fees, charges, and taxes and filed all documents required to keep the corporation qualified under state law.

Liljeberg had neither the financial backing nor the experience to build and operate a full service hospital. Therefore, he began negotiating with several major hospital management companies with the idea that one of those companies would finance, build, and operate the hospital, with Liljeberg serving as paid consultant and finally providing pharmacy service for the hospital.

Liljeberg meanwhile located a tract of land suitable for building the hospital and contracted with an architect for production of schematic diagrams and drawings. Through a company which he and his brother owned, Axel Realty, Inc., Liljeberg made arrangements about purchasing the property with its owner.

Liljeberg concluded that Hospital Affiliates International, Inc. (HAI), the nation's second-largest hospital

[1] 42 U.S.C. § 1320a-1. Without the certificate of need from the state, hospitals are ineligible for federal Medicare and Medicaid reimbursement for services rendered to participants in those programs. Without reimbursement, it is impractical (if not impossible) to operate a hopsital.

management company, was best suited to work with him in obtaining a certificate of need and building the hospital. On July 25, 1980, he and HAI executed a document setting forth each's understanding about their respective roles in developing the hospital. Pursuant to the terms of the document, HAI intended to purchase 38 acres of land in Kenner and to construct a hospital on a portion of that property. HAI also agreed to retain Liljeberg as its Regional Pharmacy Consultant for a period of 15 years, to make lease payments for a like period of years on a pharamacy to be constructed on the hospital site by Liljeberg, and to retain him as a consultant to assist in the design and construction of the hospital and pharmacy. The district court found that this document was only a letter of intent and not a binding contract and neither of the parties contest this finding.

On that same day, HAI subject to it obtaining the certificate of need, agreed with the owner of the property to buy 38.5 acres of land which Liljeberg had discovered. The owner agreed to pay Axel Realty a $250,000 commission if HAI ultimately purchased the property.

In early September, 1980, Thomas Cigarran, HAI's Senior Vice President of Development, telephoned Liljeberg's lawyer, R. Travis Douglas, and stated that the application for the certificate of need, prepared in the name of St. Jude, was almost ready for filing. Cigarran informed Douglas that, before HAI would file the application, Liljeberg would have to transfer his interest in St. Jude to HAI. Douglas replied that Liljeberg would not be willing to transfer ownership of St. Jude to HAI until the parties reached a binding agreement detailing Liljeberg's role in developing the hospital.

Next, on September 5, 1980, Douglas received a phone call from D. Todd Christofferson, HAI's Associate Corporate Counsel. Christofferson informed Douglas that he had been instructed to contact him and to work out the details of transferring the ownership of St. Jude. Douglas told Christofferson that Liljeberg was not willing to

transfer St. Jude until he had a binding agreement detailing his participation in the hospital project. Christofferson told Douglas that was a problem which Douglas would have to work out with Cigarran and that he was not going to get involved. He closed the conversation by saying that he was going to send some documents to Douglas.

A few days later, Douglas received a document entitled "Warranty and Indemnity Agreement" from Christofferson. After reading the document, Douglas concluded, that "the Warranty and Indemnity Agreement did not constitute a transfer of the ownership of St. Jude." Douglas later told Liljeberg that, in his opinion, it did not constitute a transfer of his interest in the corporation and advised him to sign it. Liljeberg did so. On September 9, 1980, Douglas mailed the signed agreement along with other documents and records of St. Jude to Christofferson.[2]

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[2] Douglas testified that he only read the first sentence of the letter of transmittal accompanying the Warranty and Indemnity Agreement. That letter reads:

> Dear Travis [Douglas]:
>
> In preparation for transferring the charter of St. Jude Hospital of Kenner, Louisiana, Inc. to HAI, I am forwarding for your review a draft warranty and indemnity agreement for John Liljeberg's signature as incorporator and director. Based on our telephone discussion earlier today, I believe this is the only document (other than John's resignation as director) that would be needed in effecting the transfer.
>
> Please give me any comments you may have regarding the enclosure. Tom Cigarran [of HAI] mentioned that he will be calling John on Monday to discuss this and other matters, so we should be prepared to move ahead as soon as possible.
>
> Sincerely yours,
>
> D. Todd Christofferson
> Associate Corporate Counsel
>
> cc: John A. Liljeberg, Jr., (w/encl.)

Douglas' letter of September 9, 1980 states that, in addition to the Warranty and Indemnity Agreement, he has enclosed a duplicate original of the Articles of Incorporation, a copy of the Initial Report by Domestic Corporation, the Original Certificate of Incorporation, a copy of a receipt for payment of filing fees and franchise taxes, a copy of a letter completing local filing on behalf of the corporation, a copy of the Annual Report for 1980, and an original Louisiana Corporation Income Tax Return. The letter concludes: "If I can be of any assistance to you in completing the organization of the corporation . . . please so indicate."

Before mailing the agreement and the documents on September 9, Douglas phoned Christofferson. During this conversation, he told Christofferson that Liljeberg had signed the Warranty and Indemnity Agreement and that he was returning it to him "for whatever use he wanted [to] make out of it." However, Douglas also told Christofferson that Liljeberg would not transfer his ownership in St. Jude "until such time as we got a deal."[3]

HAI filed the application on September 11, 1980 with the appropriate state agency. The application was filed in the name of St. Jude and described it as a "wholly-owned subsidiary" of HAI. Liljeberg and another witness testified that Liljeberg, after learning of this description of St. Jude in the application, told an official of the Louisiana Health and Human Resources Department who was handling the applications that he had not transferred ownership of St. Jude to HAI. They also testified that Liljeberg telephoned Cigarran and told him

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[3] Christofferson denied that Douglas ever told him that Liljeberg would not transfer his ownership in St. Jude until he had gotten a binding contract with HAI. The district court made no finding regarding credibility but, because Liljeberg was the prevailing party below, we are required to view all evidence in the light most favorable to him. Furthermore, it must be remembered that the district court explicitly found that both Liljeberg and HAI always assumed and anticipated that he would not transfer his interest in St. Jude until a legally binding contract had been executed which protected his interests. It would have been impossible for the district court to make such a finding unless he had implicitly credited Douglas's testimony about this conversation with Christofferson.

and another HAI official that he objected to the representation of St. Jude as a wholly owned subsidiary of HAI and that he had not transferred St. Jude. This testimony was contradicted by deposition testimony of the state official and by Cigarran's testimony.[4]

HAI purchased the 38.5 acres of land on March 16, 1981. On that day HAI and Axel Realty, through its president, Liljeberg, agreed that HAI would pay Axel a $250,000 commission (plus interest), "if HAI receives final Section 1122 approval from the State of Louisiana . . . ." Liljeberg forwarded a letter that same day to the owner of the property releasing it from its obligation to pay Axel Realty a $250,000 brokerage fee.

On March 25, 1981, Liljeberg and HAI signed a second letter of intent. This letter was to confirm the agreement between HAI and Liljeberg regarding HAI's use of the 38.5 acres of land which HAI had purchased on March 16, 1981, for development of a hospital. Liljeberg was to receive beneficial ownership of 26 acres of land for those uses upon which he and HAI agreed. Liljeberg was to have a 25 year contract pursuant to which he would provide pharmacy services to HAI and was to be retained as a design and construction consultant at a salary of $16,500 per month. He would remain as such until the hospital was opened.

Pursuant to the March 25 letter, HAI could, following receipt of the Section 1122 approval, elect not to proceed with the construction of the hospital. It could do so by selling the stock of the HAI subsidiary corporation holding the Section 1122 approval to Liljeberg for cash equal to $1 plus HAI's cost of purchasing the 38.5 acres of land.

The district court found as a fact that it had always been anticipated between HAI and Liljeberg that HAI

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[4] See fn. 3.

would ultimately own all or a part of St. Jude, but only after Liljeberg's financial and operational participation in the overall hospital project had been reduced to a final and legally binding contractual relationship with HAI. The district court also found as a fact that Liljeberg believed the March 25 letter of intent was a legally binding document which, subject to some minor modifications, detailed his participation in the hospital project. After these issues were resolved, Liljeberg's intention, according to the district court's findings, "was thereafter to transfer all or part of the ownership of St. Jude Hospital to Hospital Affiliates International."

On August 26, 1981, Hospital Corporation of America (HCA), the country's largest hospital management firm, acquired HAI. Liljeberg had negotiated with HCA before deciding to affiliate his efforts on behalf of St. Jude with HAI. The document listing HAI's assets to be transferred to HCA (through a wholly-owned HCA subsidiary named Health Services Acquisition Corporation) made no mention of St. Jude. On that same day, the Secretary of the Louisiana Department of Health and Human Resources personally delivered Liljeberg a letter approving a certificate of need in the name of St. Jude and the certificate.

Shortly after August 26, 1981, Liljeberg telephoned HCA and reported that the Section 1122 certificate had been issued to St. Jude. He then requested payment of the real estate commission which HAI had agreed to pay Axel Realty. Sometime after Liljeberg had mailed copies of the certificate to it, HCA paid the commission ($271,000) to Axel Realty.

On September 23, 1981, HCA wrote Liljeberg to inform him that, in the opinion of its legal staff, no final legally binding agreement had existed between Liljeberg and HAI prior to the merger. HCA stated that it would "contact [Liljeberg] in the next few days to begin struc-

turing a definitive agreement . . . ." HCA later advised Liljeberg that, in its view, the Warranty and Indemnity Agreement constituted a transfer of ownership of St. Jude to Health Services Acquisition Corporation (HSAC), and the subsequent merger vested ownership of both St. Jude and the certificate of need in HCA. Liljeberg maintained that no such transfer occurred.

HSAC filed this action seeking a declaratory judgment that the warranty and indemnity agreement agreement in fact transferred St. Jude's ownership to HAI and that, as a result, it owned St. Jude. Liljeberg counterclaimed, essentially seeking an injunction to prohibit HCA and HSAC from interfering with his claim to ownership of St. Jude.

The district court, after a bench trial, found that the warranty and indemnity agreement did not transfer ownership of St. Jude to HAI. It, therefore, declined to issue the declaratory judgment HSAC sought. The court also denied Liljeberg's request for injunctive relief because it found no evidence that HCA or HSAC was interfering with Liljeberg's efforts to exploit the certificate.

Because the certificate expires on February 25, 1983, a panel of this court granted Liljeberg's motion to expedite the appeal.

I.

HSAC first contends that the Warranty and Indemnity Agreement was a contract between HAI and Liljeberg which transferred the ownership of St. Jude to HAI. Because this is a diversity case, we look to Louisiana law for guidance on the essentials of contract formation.

Louisiana requires four elements to form a valid contract: capacity, mutual consent, a certain object for the contract, and a lawful purpose. First National Bank of Shreveport v. Williams, 346 So.2d 257 (La.Ct.App. 1977). There can be no contract unless both parties consent to the substantial elements of the agreement, that is, unless there is a "meeting of the minds." Custom Builders & Supply, Inc. v. Revels, 310 So.2d 862 (La.Ct. App. 1975).

The district court found that the evidence "clearly shows no transfer of title of the [St. Jude] corporation." The court reasoned that there was no language in the agreement that could be construed to transfer the corporation. The court added that Douglas' mailing the warranty agreement and the other documents,[5] to HAI was only in contemplation of a later transfer.

Therefore, we take the district court's conclusions to indicate that the Warranty and Indemnity Agreement was not a contract to transfer ownership of the corporation. The existence of a contract is a question of fact, *see* Gibson & Odom Electric Company, Inc. v. R. F. Ball Construction Company, Inc., 368 F.2d 182 (5th Cir. 1966), and we cannot say that the district court's determination that there was no contract of transfer was clearly erroneous.

The district court also found that there was no other agreement, oral or written, which had the effect of transferring ownership. We have carefully reviewed the record and this finding is not clearly erroneous.

It is clear from the testimony that Liljeberg and Douglas believed that the Warranty and Indemnity Agreement did not transfer the ownership of St. Jude. Thus, we cannot say that there was mutual consent to a transfer or that the parties agreed to the substantial elements of the contract.

For the foregoing reasons, we agree with the district court that the Warranty and Indemnity Agreement did not transfer ownership of St. Jude to HAI.

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[5] See fn. 2.

II.

Secondly, HSAC contends that Liljeberg is estopped from claiming that he owns St. Jude. This estoppel argument is based primarily on the conduct of Liljeberg in signing and returning the Warranty and Indemnity Agreement to HAI and the actions which HAI took after it received that document. A second basis for the claimed estoppel is Liljeberg's request for and acceptance of a commission of $271,000 on the sale of certain real estate to HAI by Urban Redevelopment, Inc.

The district court failed to make any specific conclusions of law with respect to HSAC's estoppel argument. However, it made sufficient findings of fact to enable us to decide whether Liljeberg was estopped from claiming ownership of St. Jude. In such circumstances, a remand for findings and conclusions of law on the estoppel issue will not add anything essential to the determination of its merits. Therefore, remand to the district court is unnecessary. See *Armstrong v. Collier*, 536 F.2d 72 (5th Cir. 1976).

Equitable estoppel or "estoppel in pais" arises when a party, by his acts, or silence induces another to believe that certain facts exist and the other person justifiably relies and acts on such belief to his prejudice. The doctrine estops the denial of the prejudicial facts. Estoppel, because it bars the normal assertion of rights, is not favored in Louisiana law and is used sparingly. *Wilkinson v. Wilkinson*, 323 So.2d 120 (La.Ct.App. 1975); *Shirley v. Campbell*, 151 So.2d 557 (La.Ct.App. 1963); *Otto v. Cities Services Co.*, 415 F.Supp. 837 (W.D.La. 1976); *Interpace Corp. v. Board of Commissioners, etc.*, 489 F.Supp. 140 (E.D.La. 1980).

A party invoking the doctrine of estoppel must prove the facts upon which the estoppel is based and must establish all three elements of estoppel: 1) a representation by action or word; 2) justifiable reliance on the repre-

sentation; and 3) a detrimental change in one's position because of reliance. *Wilkinson v. Wilkinson, supra* at 126.

Based on Liljeberg's signing of the Warranty and Indemnity Agreement, HSAC argues that HAI was led to believe that Liljeberg had transferred the ownership of St. Jude to it and on this reliance the application for Section 1122 approval was filed with the state representing that St. Jude was a wholly owned subsidiary of HAI; HAI paid $4,700,000 for the purchase of land for the sole purpose of building and operating a hospital; and a commission of $271,000 on the sale was paid to Liljeberg.

Apparently, HSAC's argument is that Liljeberg, knowing HAI's intent that the Warranty and Indemnity Agreement be a transfer of St. Jude, had a duty to speak out, if in fact, he did not intend the execution of that agreement to have such an effect. His silence was a representation that this act constituted a transfer of St. Jude and he is now estopped from claiming otherwise.

Silence as a representation is not a basis for estoppel unless a duty to speak exists. For such a duty to exist, the following conditions must be met: (1) the party estopped must be shown to have had an opportunity to speak or act; (2) the party estopped must have had full knowledge of the facts and others' rights or; (3) the party estopped must have intended to mislead or at least have had a willingness that others should be deceived; (4) the pleader of estoppel must be shown to have been ignorant of the truth and without convenient and ready means of learning the truth; and (5) the pleader of estoppel must have been misled into doing what he would not have done but for the silence of the party estopped. *Duthu v. Allements' Roberson Machine Works*, 393 So.2d 184 (La.Ct.App. 1980); *Westenberger v. State Through Department of Education*, 333 So.2d 264 (La.Ct.App. 1976).

Based on findings of fact made by the district court which are not clearly erroneous, we find that at least two of the conditions have not been met, and that Liljeberg had no duty to speak. Accordingly, he has made no representation and estoppel cannot lie against him based on his execution of the Warranty and Indemnity Agreement.

First of all, as found by the District Court, both HAI and Liljeberg always anticipated and assumed that Liljeberg would not transfer St. Jude Corporation until he had a final and legally binding contractual relationship with HAI which spelled out his financial and operational participation in the overall hospital project. Liljeberg's attorney, Travis Douglas, had told Todd Christofferson, HAI's counsel, shortly before the Warranty and Indemnity Agreement was mailed to Liljeberg, that Liljeberg would not transfer St. Jude to HAI unless and until final and legally binding contractual documents, setting forth Lilejeberg's participation in the hospital project, were executed. Liljeberg had been told before executing the Warranty and Indemnity Agreement that the document did not constitute a transfer of St. Jude to HAI.

Ample support for these findings of fact are found in the record. For example, Travis Douglas, on the day he returned the signed Warranty and Indemnity Agreement to HAI, told Christofferson that Liljeberg had signed the agreement and that he was going to return it to him for whatever use he wanted to make out of it. However, Douglas also told him that Liljeberg was not going to transfer St. Jude to HAI until he had a binding legal contract detailing his participation in the hospital project, which seems to us a reasonable and plausible position.

Under these circumstances, it is impossible to find that Liljeberg intended to mislead HAI into believing that he was transferring St. Jude by executing the Warranty and Indemnity Agreement. He was not even willing for HAI to be deceived in this regard. He always made it

clear that he did not intend a transfer to take place until his participation contract had been signed.

Furthermore, it is impossible to find that HAI was ignorant of the truth, i.e., that Liljeberg was not transferring ownership of St. Jude by executing the Warranty and Indemnity Agreement. HAI, like Liljeberg, as found by the district court, always anticipated and assumed that the ownership of St. Jude would not be transferred until his participation contract had been executed. Its counsel and corporate officers had been informed several times that Liljeberg was not going to transfer the ownership of St. Jude until that was done.

Finding for the foregoing reasons that Liljeberg was not estopped from claiming ownership of St. Jude because of any silence or inaction on his part after he signed the Warranty and Indemnity Agreement, we turn to HSAC's next basis for estoppel. HSAC points to the fact that Liljeberg induced Axel Realty, Inc., a firm in which he had a fifty percent ownership interest, to call upon HCA for a real estate commission which was due it under the terms of the March 16, 1981 agreement and to accept $271,000 in payment thereof. Because this payment was not due until HAI received final Section 1122 approval, and because HAI could not be the owner of the Section 1122 certificate without owning St. Jude, the applicant for the approval, HSAC contends that Liljeberg, by causing Axel Realty to request and accept this payment, agreed that HAI owned St. Jude and is estopped from claiming otherwise.

This argument ignores the district court's finding of fact that both HAI and Liljeberg always contemplated that he would not transfer any part of St. Jude to HAI until his participation in the hospital project was protected by a legally binding contract. As the district court found, Liljeberg, on March 25, 1981, believed he had obtained a legally binding contract which, subject to

minor modifications, detailed his participation in the hospital project. After these issues were resolved, his intention was to transfer all or part of his ownership of St. Jude to HAI.

Under these circumstances, any agreement on Liljeberg's part that ownership of St. Jude had been transferred to HAI was contingent upon his receipt of a final and legally binding contract which spelled out his rights in the hospital project. Believing he had a document which protected his rights to that contract and having received notification on August 26, 1981, that St. Jude had been issued the Section 1122 certificate, Liljeberg was treating the situation as if that contract had been finalized, his ownership of St. Jude had been transferred and the terms of the commission agreement had been fulfilled. In no way did he intend to represent that ownership of St. Jude had been finally and unconditionally transferred.

Furthermore, HAI, like Liljeberg, assumed and anticipated that St. Jude would not be transferred to it until Liljeberg had a contract detailing his rights in the hospital project. As a result in the absence of such a contract between the parties, there can be no justifiable reliance on any representation by Liljeberg that HAI owned St. Jude. There can therefore be no estoppel based on the Axel Realty Commission Agreement.

Concerning the commission agreement, it should also be noted that HAI's Senior Vice President of Development, Tom Cigarran, testified that this agreement was independent of and separate and distinct from the question of who owned St. Jude.

With respect to whether Liljeberg's execution of the March 25, 1981, letter would estop him from claiming that ownership of St. Jude was not transferred to HAI, we would point out that HSAC has failed to show how HAI changed its position thereafter to its detriment as a

result of reliance on Liljeberg's conduct. However, even if HSAC had made such a showing, we cannot find that HAI could have justifiably relied on any representation contained in the letter that HAI then owned St. Jude, since, as we have pointed out repeatedly, the district court found both HAI and Liljeberg *always* assumed and anticipated that St. Jude would not be transferred to HAI until Liljeberg had his participation in the hospital project protected by a legally binding contract.

Based on the foregoing, we find that Liljeberg was not estopped from claiming ownership of St. Jude. Therefore, having previously found that the district court's conclusion that Liljeberg did not transfer ownership of St. Jude to HAI was correct, we agree with its conclusion that HSAC does not own St. Jude.[6]

III.

Because we have found that the district court was correct in concluding that HSAC was not the owner of St. Jude, it becomes necessary to decide whether that court was correct in denying Liljeberg the injunctive relief which he requested. Liljeberg asked the district court to issue an injunction prohibiting HSAC and HCA from claiming any right, title or interest in or to St. Jude and the Section 1122 Certificate. He contended that he was entitled to injunctive relief because HSAC and HCA intended to apply for building and other regulatory permits to build a hospital in Kenner pursuant to the Certificate of St. Jude, and because public claims of ownership of St. Jude by the two corporations had brought the hospital project to a standstill.

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[6] We note that since there was no transfer of St. Jude to HAI and that, as a result, HAI never got section 1122 approval, the terms of the Axel Realty Commission agreement have not been accomplished. Therefore, HSAC, may have a claim against Axel Realty for the amount of that commission.

The district court found that neither HSAC nor HCA had applied to the City of Kenner for a building permit to construct a hospital pursuant to the Certificate of Need issued to St. Jude. In addition, the court found that neither HSAC nor HCA had publicly asserted their claim to the Section 1122 Certificate in any manner other than by filing the present suit. Finding that there was no evidence of any threatened injury or irreparable harm suffered by Liljeberg, the district court denied his claim for injunctive relief. Sufficient support exists for the findings on which that denial of injunctive relief was based. We therefore find that the denial was proper.

Liljeberg further contends that certain actions of HSAC and HCA since the trial on the merits warrant the issuance of an injunction. The actions complained of are the mailing of a letter to the Kenner City Council and the sending of an HCA representative to a Kenner City Council meeting. Since there is no evidence of such conduct before this court, we refuse to consider it.

Lastly, Liljeberg asks this court to enjoin HSAC and HCA from claiming ownership of the Section 1122 Certificate. This is based on Liljeberg's contention that the district court, by deciding that HSAC did not own St. Jude, also decided that St. Jude owned the Section 1122 Certificate. We are not persuaded that the district court was ever presented or ever addressed the specific question of the ownership of the Section 1122 certificate. We therefore decline to now address this question as an independent issue, and we affirm the district court's denial of this requested injunctive relief.

For the foregoing reasons, the decision of the district court is

Affirmed.

RUBIN, Circuit Judge, dissenting.

The issues in this diversity case are factual. The Louisiana law that we must follow is clear. Therefore, I ought to be able to still my doubts and join my colleagues in affirming the district court's opinion. But the role of appellate courts is not limited to establishing legal principles. It is also our duty to correct error. *See* Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A.J. 860,862 (1980). Therefore, I voice the reasons why I cannot simply subscribe to the opinion and proceed to another case.

The record contains no findings of fact from the district court on the crucial estoppel issue. Seeking to avoid remand, both parties urge us to make these findings. I join my colleagues in yielding to these entreaties but I cannot reach the fact conclusions that they do.

First, let us review the controlling legal principles. In Louisiana if one party to a transaction induces another to believe certain facts and the other party in justifiable reliance on that conduct acts to his detriment, the party who has misled the other is estopped to deny the state of affairs that he represented. City of Bossier City v. Usery, 356 So.2d 1099 (La. Ct. App. 1978); *See* American Bank & Trust Co. v. Trinity Universal Life Insurance Co., 251 La. 445, 205 So.2d 35 (La. 1967).

Liljeberg and Hospital Affiliates (HAI) were not, in September 1980, strangers engaged in negotiating a simple sale of corporate stock. They had dealt with each other for months in an effort to obtain the certificate of need essential to their joint aim. Neither Liljeberg nor St. Jude had the financial strength or experience to warrant issuance of a certificate. HAI was to assure state authorities that it could provide the essential management and financial resources. Liljeberg and HAI both contemplated that, if the certificate were issued, HAI would operate the hospital and control the corporate entity re-

ceiving the certificate. HAI was prepared to invest $5,000,000 in the land to be used for the hospital site. Liljeberg hoped to make a commission on the sale of the land and to negotiate a contract to render services to the hospital. He could obtain neither unless HAI could secure issuance of a certificate that he alone could not get.

It was under these circumstances that, on September 5, 1980, HAI wrote Travis Douglas, who had represented Liljeberg throughout these negotiations,[1] expressing the view that the Warranty and Indemnity Agreement included with that letter was the only document necessary to transfer "ownership" of St. Jude. Both lawyers and their principals apparantly assumed that a corporation is an article of commerce that can be "owned" and, therefore, bought and sold. Whether or not that assumption is correct, my colleagues do not assay.[2]

The district court found that Douglas believed that the Warranty and Indemnity Agreement would not transfer "ownership," and so informed Liljeberg, advising him nonetheless to sign the agreement. Nothing indicates that Douglas ever told HAI that it was mistaken or that it was acting on an assumption Liljeberg and his lawyer considered to be wrong. Liljeberg signed the agreement, undoubtedly knowing (as any reasonable person would) that his action would mislead HAI, and Douglas returned the document to HAI, along with myriad corporate docu-

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[1] The letter indicates that a copy was sent to Liljeberg. There was no testimony and the district judge made no finding whether Liljeberg received or read the letter.

[2] The letter suggests that Liljeberg's resignation as a director might also be required. HAI later concluded that his resignation was unnecessary because St. Jude had never conducted an organizational meeting and no directors had ever been appointed. In my view, the right to appoint directors, and then to complete the organization of the corporation including the issuance and sale of corporate stock, and not "ownership" of St. Jude, is all that could be transferred.

ments (some of which were originals) and a letter offering assistance in completing the organization of the corporation.[3] My colleagues do not inform us what this maneuver was designed to accomplish if it was intended neither to transfer "ownership" nor to mislead HAI.

Douglas testified that he never read HAI's letter of transmittal,[4] and later testified that he read only its first

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[3] Douglas certainly understood that St. Jude was in the nascent stage, unorganized and without a board of directors. The letter states:

> [T]he corporation has had no activity of any kind . . . [I]f you deem it necessary, I will prepare, have executed and forward to you resignations from all those persons shown as the First Directors of the corporation on the Initial Report. As I informed you, the Organizational Meeting was not held and these persons were never appointed to the Board of Directors.
>
> If I can be of any assistance to you in completing the organization of the corporation . . . please so indicate.
>
> Sincerely,
>
> s/ R. Travis Douglas

Thus, the letter tells HAI to organize the corporation. My colleagues do not explain how HAI was to know that it had no legal authority to do what the letter told it to do.

[4] It is curious that a lawyer would fail to read a letter that comes to him attached to an important document. It is curiouser, as Alice said, after she had passed through the looking glass into Wonderland, that Liljeberg, who repeatedly testified that he distrusted HAI although he had contemplated entering into a complex and potentially lucrative relationship with the corporation, designed to operate over a seven-year period, did not respond to the cover letter.

At oral argument Liljeberg's counsel stated that Douglas, before mailing the Warranty and Indemnity Agreement and the other corporate documents, telephoned HAI on September 9, 1980, to insist that the documents did not transfer "ownership" of the corporation. HAI officials denied that the alleged conversation occurred. It is curiouser still that Douglas, who testified that he did not read the cover letter, nevertheless knew that HAI believed that the Warranty and Indemnity Agreement was sufficient to transfer "ownership."

line.[5] But it is uncontested that he received the letter immediately after a telephone conversation during which he and HAI officials discussed transferring "ownership" of the corporation. Furthermore, neither Liljeberg nor Douglas denied that they understood HAI's purpose in sending the warranty agreement to be the transfer of control of St. Jude. When one party to a negotiation knows that the other is acting in ignorance of the facts and of its legal rights and that the unwitting party is also unable readily to ascertain the truth, Louisiana law imposes on the party who knows the true state of affairs a duty to speak. That party may not remain silent and wilfully lead the other party into a legal trap. Silence intended, or preserved, with a willingness to mislead is as culpable as willful misstatement.[6] Duthu v. Allements' Roberson Machine Works, Inc., 393 So.2d 184, 186-87 (La. Ct. App. 1980); Westenberger v. State ex rel Department of Education, 333 So.2d 264, 271-72 (La. Ct. App. 1976). Whether Liljeberg consciously intended to mislead HAI we need not decide. His decision to sign and return the agreement knowing that HAI believed it to be sufficient to transfer "ownership" makes it clear that he was willing to mislead HAI.

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[5] The record does not indicate what Douglas understood even the first line of the letter, which he admitted reading, to mean. The first line of text in the letter reads "In preparation for *tranferring the charter* of St. Jude Hospital of . . ." (emphasis added).

[6] Liljeberg must have been aware of HAI's position because he testified that he expressly discussed with Douglas the question whether the agreement in fact legally transferred "ownership" of St. Jude. Therefore, this case is quite different from *Duthu*, for the plaintiff in that case (whom the defendant sought to estop) was herself "not aware of her legal rights, i.e., the limits of her personal obligation on behalf of the former community . . . [I]gnorance of one's rights precludes the use of silence as a basis for estoppel . . ." 393 So.2d at 187. Similarly, in *Westenberger*, the plaintiff was held not to be estopped because he "had no knowledge" of the misappropriation of the funds he sought to recover. 333 So.2d at 272.

HAI was obviously ignorant of the fact that the agreement did not transfer what the parties called "ownership," by which they meant at least the power to designate the corporation's first directors. HAI was also unable to ascertain the truth because, short of a lawsuit, it could not have established whether the agreement effected a transfer.[7] HAI was misled by Liljeberg's silence into doing what it would not otherwise have done: filing the application for a certificate of need. The HAI witnesses all testified that the company never filed an application unless it wholly controlled the filing corporation; Liljeberg testified that he was aware of that policy.[8]

Therefore, Liljeberg's silence at the time he signed the warranty agreement should estop him from claiming that the agreement, read in conjunction with the HAI cover letter and Douglas' letter enclosing corporate documents, did not transfer control of St. Jude to HAI. However, because Liljeberg's deception did not end there, the estoppel need not rest on that alone.

Liljeberg signed the March 16, 1981 commission agreement which stated that he was to receive $250,000 (plus interest) only if *HAI* received final section 1122 approval. After the certificate of need was issued, Liljeberg re-

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[7] My colleagues rely on record testimony to "establish" that HAI was not misled. They thus elect to credit testimony which has been contradicted and which the district judge made no decision to accept, without seeing or hearing either group of witnesses. I do not discern how they make this credibility determination on the basis of the typed pages.

[8] That HAI was misled is clear from the face of the application HAI there described St. Jude as a "wholly-owned subsidiary." Indeed, the entire 407-page application is devoted to describing HAI, its hospitals, its management experience, and its assets. Liljeberg's name appears only in three letters of intent to file an application for a certificate of need dated before July, 1980, and on a copy of the Warranty and Indemnity Agreement. HAI also changed the name of St. Jude's registered agent, further demonstrating its belief that it controlled St. Jude.

quested and received the commission, which, when paid, amounted to $271,000. In relieving Hospital Corporation of America (HCA), HAI's successor, of $271,000, Liljeberg never mentioned his contention that he still "owned" St. Jude, and that St. Jude, not HAI, had received the certificate. Indeed, Liljeberg testified that he *realized* the document said that HAI must get approval as a condition precedent to payment of the commission, but did not protest because he intended to 'live up to his end" of the March 25, 1981 agreement.[9]

HAI relied on Liljeberg's agreement that it owned St. Jude in buying the property on which the hospital was to be built. HCA justifiably relied on Liljeberg's agreement that it owned St. Jude in paying the commission. *See American Bank & Trust*, 251 La. at ——, 205 So.2d at 40; J. Weingarten, Inc. v. Nortgate Mall, Inc., 390 So.2d 527, 530 (La. Ct. App. 1980), *rev'd on other grounds*, 404 So.2d 896 (La. 1981).

Simply put, by signing the March 16 and March 25 agreements, Liljeberg acknowledged that HAI "owns" St. Jude. By demanding and receiving the $271,000 commission, he gained the full benefit of the March 25 agreement. He should not be permitted to claim the benefit of the contract in one breath and repudiate its plain and unambiguous language in the next.

We need not condone HCA's repudiation of the March 25, 1981 agreement. That issue is not before us. *See supra* note 9. We need decide only whether we sanction Liljeberg's chicanery. I cannot do so, and therefore, I repectfully dissent.

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[9] The March 25 agreement gave Liljeberg the right to *repurchase* St. Jude for $1.00 if *HAI* elected not to proceed with building the hospital after securing the certificate.

HCA has not stated that it does not intend to compensate Liljeberg for his efforts. At oral argument, HCA's counsel stated that he believed Liljeberg should be paid for his work and expense. However, both counsel conceded at oral argument that this issue is not now presented.

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714

SECTION "C"

HEALTH SERVICES ACQUISITION CORPORATION

versus

JOHN A. LILJEBERG, JR.

[Filed Mar. 16, 1982]

OPINION

The above captioned matter was tried before the Court sitting without a jury, on January 21 and January 22, 1982. After careful consideration of the evidence adduced at trial, the arguments of counsel, the submitted memoranda and material, the relevant facts and the applicable law, the Court, pursuant to the provisions of Fed. R. Civ. P. 52, hereby makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

1.

The complaint in this action, filed November 30, 1981, seeks a judgment declaring and decreeing that complainant, Health Services Acquisition Corporation, is the

owner of St. Jude Hospital of Kenner, Louisiana (hereinafter St. Jude Hospital).

2.

Defendant, John A. Liljeberg, Jr., answers, inter alia:

a) defendant is the sole incorporator of St. Jude Hospital;

b) defendant has never, at any time, executed any instrument or made any agreement which would transfer his ownership of St. Jude Hospital; and

c) defendant denies that complainant has any right, title or interest in and/or to St. Jude Hospital.

3.

Defendant filed a Restraining Order and Complaint for Injunction seeking, inter alia, to enjoin complainant, Health Services Acquisition Corporation, and third-party defendant, Hospital Corporation of America, their agents, employees, and all other persons, firms and corporations under their control or direction and all other persons, firms and corporations in active concert or participating with them from claiming any right, title or interest in and/or to St. Jude Hospital and the § 1122 Certificate of Need (hereinafter the Certificate of Need) and from taking any action whatever toward the construction of a hospital, pursuant to the Certificate of Need, including applications for building and other permits relating thereto, and from interfering in any way with defendant's free and unrestricted right to the ownership of St. Jude Hospital and the Certificate of Need and the right to construct a hospital in Kenner, Louisiana, pursuant thereto.

4.

Defendant's Restraining Order was DENIED on December 11, 1981, and this Court ORDERED, that trial on the motion for preliminary injunction be held at 10:00 a.m. on January 21, 1982.

5.

Pursuant to the oral consent of counsel for all parties, the Court ORDERED the trial on the merits consolidated with the trial on the motion for preliminary injunction.

The Parties

6.

Complainant, Health Services Acquisition Corporation, is a wholly owned subsidiary of the third-party defendant, Hospital Corporation of America. Both corporations are incorporated under the law of a state other than the State of Louisiana and have their principal office in the State of Tennessee.

7.

Defendant, John A. Liljeberg, Jr. (hereinafter Liljeberg), is a person of full age of majority and domiciled in the Parish of Jefferson, State of Louisiana.

Factual Background

8.

Liljeberg is a pharmacist and has his principal business office in Kenner, Louisiana.

9.

Liljeberg first conceived the idea of obtaining a full service hospital for the City of Kenner in 1964 and actively commenced his work toward this end in 1976.

10.

On October 3, 1979, Liljeberg, as sole incorporator, incorporated St. Jude Hospital under the laws of the State of Louisiana for the purpose of having this corporation apply for a Certificate of Need from the State of Louisiana, pursuant ot Section 1122 of the Social Secu-

rity Act. Since incorporation, and up to the present time, Liljeberg alone has paid all initial and annual corporation fees and charges, all tax due by the corporation, and has filed all corporate reports and documents required to keep St. Jude Hospital qualified under state law as a corporation.

11.

The Certificate of Need is important because it qualifies a hospital for certain benefits and payments under the federal Medicare and Medicaid programs.

12.

Liljeberg had never intended to operate or manage St. Jude Hospital by himself, and in approximately June 1979, he commenced negotiating with various hospital management companies for the purpose of contracting for their hospital management and operation expertise.

13.

In April, 1980, Liljeberg, through Axel Realty, Inc., a real estate brokerage corporation owned 50% by Liljeberg, located a tract of land in Kenner, Louisiana, which had been approved by the appropriate state agency as a site for a hospital.

14.

On May 28, 1980, Liljeberg addressed a letter to the New Orleans Area/Bayou River Health Systems Agency, Inc., advising said agency of his intention to construct a 300-bed primary care, full service hospital in Kenner, Louisiana. He also stated that he, as President and Chairman of the Board of St. Jude Hospital, had entered into an architectural contract with August Perez & Associates, Inc., which had completed the preliminary schematic diagrams and drawings, and that said documents had previously been submitted to the appropriate state and local governing agencies. (Exhibit D-4).

15.

Prior to August 26, 1981, Hospital Corporation of America and Hospital Affiliates International, Inc. were competitors in the field of hospital management. Liljeberg had some preliminary negotiations with Hospital Corporation of America, but by July, 1980, his most serious negotiations were with Hospital Affiliates International.

16.

On July 25, 1980, Liljeberg and Hospital Affiliates International executed a document which constituted a statement of their intentions as to their mutual roles in the hospital development. (Exhibit HC-1). All parties have agreed that Exhibit HC-1 did not constitute a binding agreement as between Liljeberg and Hospital Affiliates International. Rather, the document constituted only a letter of intent. Both Liljeberg and officials at Hospital Affiliates International assumed that a formal contract would be entered into at some later date.

17.

On July 25, 1980, the following documents were also executed:

a) An agreement to purchase the said tract executed between Urban Redevelopment, Inc., the owner of the tract, and Hospital Affiliates International, as prospective purchaser, the price being $5,000,000.00. The obligation of Hospital Affiliates International under this agreement was conditioned upon the issuance of the Certificate of Need. (Exhibit HC-2).

b) An escrow agreement between Urban Redevelopments, Inc. and Hospital Affiliates International and Whitney National Bank, whereby Hospital Affiliates International placed $500,000.00 in escrow with Whitney Bank, all in conjunction with the said purchase agreement. (Exhibit D-1).

c) An agreement to pay commission, whereby Urban Redevelopments, Inc. agreed to pay Axel Realty, Inc. a real estate sales commission of $250,000.00. (Exhibit D-5).

d) A letter agreement between Hospital Affiliates International and Liljeberg, as President of Jefferson-St. Jude Properties, Inc., whereby Liljeberg agreed to pay Hospital Affiliates International interest on its $500,000.00 deposit in the event the purchase of the tract was not ultimately consummated. (Exhibit D-2).

18.

It was always anticipated between Hospital Affiliates International and Liljeberg that Hospital Affiliates International would ultimately own all or a part of St. Jude Hospital, but only after Liljeberg's financial and operational participation in the overall hospital project had been reduced to final and legally binding contractual relationship with Hospital Affiliates International.

19.

During this time, and until September 5, 1980, Hospital Affiliates International and Liljeberg had agreed that Hospital Affiliates International would prepare and file the application for the Certificate of Need on behalf of St. Jude Hospital. The record also reflects that up to this point, Liljeberg and Hospital Affiliates International worked together in preparing the application for the Certificate of Need.

20.

In early September, 1980, a representative of Hospital Affiliates International telephoned Travis Douglas, Liljeberg's attorney, to advise that the application for the Certificate of Need was ready for filing and Hospital Affiliates International desired for Liljeberg to transfer his ownership rights in St. Jude Hospital to Hospital

Affiliates International. Douglas responded that Liljeberg would not transfer the corporation to Hospital Affiliates International unless and until final and legal binding contractual documents, setting forth Liljeberg's participation in the project, were executed.

21.

Douglas did not have, at any time, any authorization to transfer ownership of St. Jude Hospital to anyone.

22.

On September 5, 1980, D. Todd Christofferson, Associate Corporate Counsel of Hospital Affiliates International, forwarded to Douglas a Warranty and Indemnity Agreement (Exhibit HC-4). In an accompanying letter, Christofferson indicated that he thought the Warranty and Indemnity Agreement was the only document needed to effect transfer of St. Jude Hospital from Liljeberg to Hospital Affiliates International (Exhibit HC-14). Douglas believed that the Warranty and Indemnity Agreement was erroneous and advised Liljeberg that, in his opinion, the document did not constitute a transfer of the ownership of St. Jude Hospital and recommended that Liljeberg sign the instrument so as to expedite and facilitate the filing of application for the Certificate of Need. Liljeberg signed the Warranty and Indemnity Agreement and returned the same to Hospital Affiliates International.

The Warranty and Indemnity Agreement was accepted and agreed to by Thomas G. Ciggarian, on behalf of Hospital Affiliates International on September 9, 1980.

23.

On September 9, 1980, Douglas transmitted to Hospital Affiliates International the corporate documents and records of St. Jude Hospital, as set forth in Douglas' letter of September 9, 1980. (Exhibit HC-15). Up until this

time, St. Jude Hospital had not issued any corporate stock.

24.

On September 11, 1980, an application for the Certificate of Need, in the name of St. Jude Hospital of Kenner, La., Inc., was filed with the appropriate state agencies.

25.

On or about March 16, 1981, Hospital Affiliates International caused one of its wholly-owned subsidiaries to purchase the tract of land set forth in Exhibit HC-2.

26.

On or about March 25, 1981, Liljeberg and Hospital Affiliates International executed a document which Liljeberg believed to be legally binding, detailing his participation in the hospital project, all subject to some minor modifications. (Exhibit HC-6). After these issues were resolved, his intention was thereafter to transfer all or part of the ownership of St. Jude Hospital to Hospital Affiliates International.

27.

On August 26, 1981, Hospital Corporation of America acquired Hospital Affiliates International through the merger of Hospital Affiliates International with Health Services Acquisition Corporation, a wholly owned subsidiary of Hospital Corporation of America. (Exhibit D-3). As a result of this merger, all assets owned by Hospital Affiliates International became assets of Health Services Acquisition Corporation. At the time, Hospital Corporation of America and Hospital Affiliates International were two of the largest hospital management corporations in the country, owning or managing 343 hospitals and 155 hospitals, respectively.

28.

Among the documents utilized for the merger of Hospital Affiliates International into Health Services Acquisition Corporation was a list of subsidiaries, in which Hospital Affiliates International claimed ownership. St. Jude Hospital was not listed as a subsidiary of Hospital Affiliates International.

29.

On August 26, 1981, Liljeberg was handed a letter by George A. Fisher, Secretary, Department of Health and Human Resources for the State of Louisiana, addressed to Liljeberg, advising that the application by St. Jude Hospital for a Certificate of Need had been approved (Exhibit D-7). Fisher also gave Liljeberg the original Certificate of Need. The said Certificate of Need expires of its own terms on August 25, 1982.

30.

Shortly after August 26, 1981, Liljeberg telephoned Hospital Corporation of America reporting that the Certificate of Need had been issued to St. Jude Hospital and requesting payment to Axel Realty, Inc. of the real estate commission. Liljeberg caused copies of the Certificate of Need to be sent to Hospital Corporation of America. Thereafter, Hospital Corporation of America paid the commission to Axel Realty, Inc.

31.

On September 23, 1981, David G. Williamson, Executive Vice President of Hospital Corporation of America, wrote Liljeberg stating that Hospital Corporation of America had reviewed the file and that there was no final or legally binding contract between either Hospital Affiliates International or Hospital Corporation of America and Liljeberg. (Exhibit HC-10).

32.

Hospital Corporation of America subsequently advised Liljeberg that the Warranty and Indemnity Agreement of September 9, 1980 constituted a transfer by Liljeberg of the ownership of St. Jude Hospital to Hospital Affiliates International and that as a result of the merger of Hospital Affiliates International and Health Services Acquisition Corporation, Hospital Corporation of America became the owner of St. Jude Hospital as well as the Certificate of Need. Moreover, Hospital Corporation of America maintained that Liljeberg had no contractual rights to participate in the hospital project. Liljeberg contended that he had never transferred his ownership interest in St. Jude Hospital and did not intend to execute such a transfer until his role in St. Jude Hospital had been finalized into a formal, binding contract. When efforts to amicably resolve the dispute over ownership of St. Jude Hospital failed, this lawsuit followed.

Injunctive Relief

33.

Liljeberg contends that he is entitled to injunctive relief in this case because Hospital Corporation of America and Health Services Acquisition Corporation intend to apply for building and other regulatory permits to build a hospital in Kenner pursuant to the Certificate of Need owned by St. Jude Hospital, and because public claims of ownership of St. Jude Hospital by Hospital Corporation of America and Health Services Acquisition Corporation have brought the hospital project to a standstill.

34.

There is no evidence that Hospital Corporation of America or its subsidiary, Health Services Acquisition Corporation, has applied to the City of Kenner for a building permit to construct a hospital pursuant to the Certificate of Need issued to St. Jude Hospital.

35.

There is no evidence that Hospital Corporation of America or its subsidiary, Health Services Acquisition Corporation, has publicly asserted their claim to the Certificate of Need in any manner other than filing this lawsuit.

36.

To the extent that these Findings of Fact constitute Conclusions of Law, they are specifically adopted as both FINDINGS OF FACT AND CONCLUSIONS OF LAW.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of the parties and of the subject matter of this action by virtue of 28 U.S.C. §§ 1332, 2201 and Fed.R.Civ.P. 65. Venue is properly laid in the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1391.

2.

In actions brought under diversity jurisdiction, the Court must apply the forum state's choice of law rules. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Long Island Trust Co. v. Dicker*, 659 F.2d 641, 648 (5th Cir. 1981); *Rohmer, Gehrig & Co. v. Capital City Bank*, 655 F.2d 571, 578 (5th Cir. 1981); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1144 (5th Cir. 1981).

3.

Traditionally, Louisiana has followed the general rule that the nature, validity and construction of a contract is to be determined by the law of the place where it is made. L.S.A.-C.C. Art. 10. Absent contrary intent by the parties, a contract is considered executed at the place where the offer is accepted or where the last act neces-

sary to a meeting of the minds or to completing the contract is performed. *Porter v. American Optical Corp.*, *supra* at 1144-45. Recently, however, Louisiana courts have adopted an interest analysis approach to choice of law issues and have applied Louisiana law to construe a contract, even though the contract was made outside of the state, if Louisiana has the most substantial interest in the controversy. *Succession of Dunham*, 393 So.2d 438, 444 (La. App. 1st Cir. 1980); *Wickham v. Prudential Insurance Co. of America*, 366 So.2d 951, 954 (La. App. 1st Cir. 1978); *Sutton v. Langley*, 330 So.2d 321, 326-27 (La. App. 2d Cir.), *writs denied*, 332 So.2d 805, 332 So.2d 820, 333 So.2d 242 (1976).

4.

In the instant matter, the complainant has alleged that Liljeberg transferred all of his ownership interest in St. Jude Hospital to Hospital Affiliates International when the Warranty and Indemnity Agreement was executed and when Douglas forwarded various St. Jude Hospital corporate documents to Hospital Affiliates International. Liljeberg signed the Warranty and Indemnity Agreement in Louisiana, but the agreement was ultimately accepted and agreed to by Hospital Affiliates International in Tennessee. Hence, at least this aspect of the alleged contract appears to have been performed in Tennessee. On the other hand, Douglas mailed the St. Jude Hospital documents from Louisiana to Hospital Affiliates International in Tennessee, and, therefore, this aspect of the alleged contract could be said to have occurred either in Louisiana or Tennessee. Regardless of where the alleged contract was made, Louisiana clearly has the most substantial interest in this controversy. The real issue in this lawsuit concerns the ownership of St. Jude Hospital, a Louisiana corporation incorporated for the purpose of building a hospital in Kenner, Louisiana, and whose principle asset consists of the Certificate of Need issued by

the State of Louisiana. Under the interest analysis employed by the Louisiana judiciary, which this Court is obligated to follow, the law of the State of Louisiana will govern the nature, validity, and construction of the alleged agreement to transfer ownership of St. Jude Hospital. *Wickham v. Prudential Insurance Co. of America*, *supra*.

5.

It is axiomatic under Louisiana law that a legally binding agreement requires a meeting of the minds of parties upon the common ground of mutual understanding concerning facts and subject-matter. *Jones v. Jones*, 156 La. 715, 101 So.2d 116 (1924). To constitute a contract, there must be something proposed by one person, accepted and agreed to by another, and the will of both parties must be on the same point. LSA-C.C. Art. 1978; *Superior Merchandise Corp. v. Oser*, 8 So.2d 770, 772 (La. App. Orl. 1942). Legal agreements have the effect of laws upon the parties, and no one but the parties can abrogate or modify said agreements. Courts are bound to give legal effect to all such contracts according to the true intent of all the parties, and the intent is to be determined by the words of the contract, when the words are clear and explicit and lead to no absurd consequences. LSA-C.C. Art. 1945; *Rubicon Chemicals, Inc. v. Arkwright-Boston Manufacturers Insurance Co.*, 501 F.Supp. 1213, 1218 (M.D. La. 1980); *United States v. 926.787 Acres of Land, More or Less, in Iberia Parish, State of Louisiana*, 227 F.Supp. 361, 364 (E.D. La. 1964).

6.

Generally parol evidence may not be admitted against or beyond what is contained in the language of the contract, except to clarify ambiguities and to show the intention of the parties. LSA-C.C. Art. 2276; *Moreau v. Otis Elevator Co.*, 531 F.2d 311, 313 (5th Cir. 1976); *Washington Aluminum Co. v. Pittman Construction Co.*, 383 F.2d 798, 801 (5th Cir. 1967).

7.

The evidence adduced at trial clearly shows no transfer of title of the corporation known as St. Jude Hospital from Liljeberg to Hospital Affiliates International.

8.

The Warranty and Indemnity Agreement is clear and unambigious. Under this agreement, Liljeberg makes certain warranties or representations about St. Jude Hospital and then promises to indemnify Hospital Affiliates International for breach of warranty. While this type of agreement is often executed in connection with a transfer of corporate ownership, there is no language within the Warranty and Indemnity Agreement which can be construed as transfering the corporation known as St. Jude Hospital from Liljeberg to Hospital Affiliates International. Hence, the Court finds that the Warranty and Indemnity Agreement did not transfer ownership of St. Jude Hospital from Liljeberg to Hospital Affiliates International.

Likewise, the transmittal by Douglas of certain St. Jude Hospital corporate documents to Hospital Affiliates International, when considered either by itself or in connection with the execution of the Warranty and Indemnity Agreement, did not constitute a transfer of St. Jude Hospital from Liljeberg to Hospital Affiliates International. Again, this is the type of transaction which would normally occur in contemplation of a transfer in the ownership of a corporation from one party to another. While it is clear that an eventual transfer of St. Jude Hospital was intended, the mere fact that such documents were transmitted to Hospital Affiliates International, along with other preliminary negotiations, did not transfer the ownership of St. Jude Hospital to Hospital Affiliates International. At this time, St. Jude Hospital had not issued any stock. Under Louisiana law,

only the incorporator can act on behalf of a corporation until shares have been issued. As stated by the Louisiana Supreme Court, "Promoters are often referred to, especially in the English cases, as 'projectors,' 'agents,' 'stewards,' or 'trustees,' but whatever the term applied, it means one who acts in the formation, establishment, and control of a company prior to the incorporation and the assumption of control by the board of directors." *Smalley v. Bernstein*, 165 La. 1, 115 So. 347, 350 (1927) (quoting from 14 C.J. § 282, at 251); *see also* L.S.A.-R.S. § 12:142A (authorizing the incorporators to commence a voluntary proceeding for dissolution of a corporation where no shares have been issued). Hence, Liljeberg, as the promoter and sole incorporator, continues to act as a fiduciary of the corporation, St. Jude Hospital, until he relinquishes that right or his interest in St. Jude Hospital. There is no evidence that Liljeberg has relinquished or transfered his rights or interests in St. Jude Hospital.

9.

The complainant, Health Services Acquisition Corporation, is not the owner of St. Jude Hospital.

Injunctive Relief

10.

There is no evidence in this case of any threatened injury or irreparable harm suffered by movant Liljeberg; therefore, an injunction is unnecessary in this case.

11.

Each party shall bear their own costs.

New Orleans, Louisiana, this the 12th day of March, 1982.

/s/ Robert C. Collins
United States District Judge

APPENDIX J

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualiify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An officer in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-957

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,
Petitioner

versus

HEALTH SERVICES ACQUISITION CORP.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a Court, when presented with facts that would cause a reasonable person to firmly expect a judge to know of grounds requiring his recusal under 28 U.S.C. §455(a), set aside a judgment rendered by him to preserve the impeccability of the judicial system?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-957

JOHN A. LILJEBERG, JR.,
Petitioner

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR NOT GRANTING THE WRIT

1. There is no conflict between decisions of the Fifth and Seventh Circuits as claimed by Petitioner.

   Petitioner erroneously reads the decisions of the Seventh Circuit and particularly *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986), as barring retroactive relief under 28 U.S.C. §455(a) in this case. While the Seventh Circuit has addressed the issue of retroactive relief, it has not confronted the situation presented here, namely the timely bringing of a motion to vacate on recusal grounds where there was no knowledge of the recusal grounds until after judgment had been rendered. Furthermore, dicta in its decisions suggests that it would reach the same result as in this case if it were confronted with the same factual situation.

2. The interpretation of 28 U.S.C. §455(a) as applied in this case is workable and flexible and does not produce the dire consequences predicted by Petitioner.

3. The interpretation of 28 U.S.C. §455(a) as applied in this case preserves the impeccability of the judicial system

and its "appearance" as legislated by Congress.

STATEMENT OF THE CASE

The subject litigation was filed by Health Services Acquisition Corp. ("HSAC") on November 30, 1981 to obtain declaratory judgment as to the ownership of St. Jude Hospital of Kenner, La., Inc. ("St. Jude"). Trial on the merits was held before the Honorable Robert F. Collins on January 21-22, 1982, and on March 12, 1982, Judge Collins rendered judgment, entered on March 16, 1982, dismissing HSAC's case and declaring Liljeberg to be the owner of St. Jude. The decision was subsequently affirmed by the Fifth Circuit on October 18, 1982 (App. No. 82-3240), by a 2-1 decision with a strenuous dissent by Circuit Judge Alvin B. Rubin who refused to sanction what he viewed as petitioner Liljeberg's "chicanery." Petitioner's Appendix H, p. 78a.

On August 17, 1983, HSAC learned that Judge Collins was a member of the Board of Trustees of Loyola University during the pendency of negotiations between Loyola and defendant Liljeberg for the sale of certain Loyola property in the "Monroe Tract" to Liljeberg for the express purpose of building the St. Jude Hospital. The hospital was to be built pursuant to the approval awarded by state and federal agencies in the name of St. Jude under Section 1122 of the Social Security Act (42 U.S.C. §1320a-1). The ownership of St. Jude was the subject of the action heard by Judge Collins and ruled upon by him while he was a member of the Loyola Board. Loyola had a substantial interest in the outcome of the litigation then before Judge Collins because a decision favorable to Liljeberg would result in a significant increase in the value of land owned by Loyola which was adjacent to the property to be sold to Liljeberg.[1]

[1] The full ramifications of a result favorable to Liljeberg are explained by the Fifth Circuit. Petitioner's Appendix A, p. 8a.

Shortly after learning of the connection between Judge Collins and Loyola, and Loyola and Liljeberg, HSAC filed a motion to vacate the March 1982 judgment pursuant to 28 U.S.C. §455(a) and (b). Judge Collins denied the motion and declined to vacate the judgment. HSAC appealed to the Fifth Circuit, which remanded the matter to a judge other than Judge Collins, to develop more specific information about Judge Collins' knowledge of Loyola's interest, observing that, "[T]he judiciary must be governed by the appearance, as well as the reality, of disinterested adjudication."

On remand, a hearing based solely on documentary evidence and deposition testimony was held before another district judge. The key evidence supporting that judge's and the Fifth Circuit's finding that Judge Collins had, at a minimum,[2] constructive knowledge of Loyola's interest begins with his membership on the Loyola Board of Trustees, his presence at Loyola Board meetings and his regular receipt of written material about the Board's deliberations and actions. The lower court's findings of fact, which were in large measure adopted by the Fifth Circuit, reveal that Judge Collins was a member of the Loyola Board of Trustees from 1977 through 1983. During that time the Board met five times a year. The minutes of each meeting were prepared several weeks after the meeting. The minutes, along with an agenda for the upcoming meeting and materials relevant to issues to be considered at that meeting, were then mailed to each Board member, including Judge Collins. Thus, all Board members were provided three possible sources of information concerning

[2] The district court and the Fifth Circuit found that Judge Collins had actual knowledge that he failed to recall. Petitioner's Appendix A, p. 9a and Petitioner's Appendix B, p. 29a, n. 12.

Board activities and interests – (1) an agenda together with pertinent documents before each meeting; (2) presence at and participation in the meeting; (3) minutes after the meeting.

The disposition of the Monroe Tract, significant portions of which were ultimately sold to Liljeberg conditioned upon his obtaining favorable rezoning of other Loyola property adjacent to the hospital site, was discussed at Board meetings as early as March 1979. The first specific mention of the St. Jude Hospital was made in the minutes of the November 29, 1979 meeting wherein Board members were informed that Loyola representatives had discussed selling Loyola property to a group of developers interested in building St. Jude Hospital. It was also mentioned that the Board wanted to have this property rezoned.

Detailed discussions of the St. Jude Hospital project are reflected in the minutes of the very next meeting of the Board of Trustees which took place on January 24, 1980, and which, according to the findings of fact made by the district court Judge Collins attended, and at which time he heard the report of the Real Estate Committee wherein the following topics were considered and discussed:

1. The first St. Jude offer to purchase portions of the Monroe Tract made by Liljeberg;
2. The need for a certificate of need in order for the hospital to receive Medicare and Medicaid reimbursement;
3. The rejection of the first offer by the Real Estate Committee and correspondence informing Liljeberg of the rejection as well as of the fact that "*Loyola was desirous of continuing negotiations with St. Jude Properties but, that until a certificate of need were forthcoming, Loyola would more than likely not be interested in the project.*" (emphasis added);
4. The second offer made by the Liljeberg group;
5. The approach made to the then chairman of the Loyola Board, Moise Steeg, by the attorney for St. Jude requesting assistance with the preparation of a prospectus and a public offering to raise funds for the St. Jude Project;
6. Steeg's decision to withdraw his services from the Liljeberg group based upon Steeg's determination that there was a conflict of interest.

The minutes, which contain four references to Liljeberg as the developer of the St. Jude hospital project, further report a unanimously passed Board motion to refer the second offer made by St. Jude to the Real Estate Committee for further study, and to have St. Jude informed of this action.

Not only was it specifically found that the Judge heard this report but the district court determined ". . . that due to Judge Collins' attendance at the meetings in which the sale to Liljeberg was discussed, *he had actual knowledge of Loyola's potential interest at the time of those meetings, on January 24, 1980 and September 25, 1981, both of which occurred prior to this litigation.*" Petitioner's Appendix B, p. 29a, n. 12. (emphasis added).

Thus, even before the lawsuit was filed and allotted to Judge Collins, he had been informed of Loyola's interest in continuing negotiations with Liljeberg and of the

importance of securing a certificate of need to Loyola's decision on proceeding with the project.

It was further found that at the March 6, 1980 meeting of the Loyola University Board of Trustees, the Real Estate Committee and the President's Council Real Estate Committee reported their recommendation to the Board that it reject the then most recent offer made by St. Jude Properties, and that all negotiations relative to this particular project be terminated. Contained in the report was a summary of the offer as well as the observation that the group spearheaded by Liljeberg had not [at that time] obtained a certificate of need. Although Judge Collins was not present at the meeting, based on the findings of the district court that the Judge customarily read previous Board minutes before the next meeting, a reasonable person could deduce that he read this report.

After a lull in the negotiations with St. Jude and Liljeberg, during which time several other proposals were considered, activity resumed on September 25, 1981, when the Real Estate Committee reported that a new hospital had been approved for the Kenner area. Note is made in the report that the group receiving the approval was not HCA. The district court specifically found that Judge Collins had actual knowledge, albeit subsequently forgotten, of Loyola's interest by virtue of his attendance at this meeting. Petitioner's Appendix B, p. 29a, n. 12.

On or about October 29, 1981, the Board was advised of "renewed activity regarding construction of a hospital on the Monroe Tract in a document entitled 'Real Estate Matters,' " which was mailed to all Board members including Judge Collins for their consideration at the

November 12, 1981 Board meeting. This document also identified Loyola's property as a prime location for such a project. At the very next meeting held on November 12, 1981, some two weeks before the filing of the lawsuit and its allotment to Judge Collins, the entire Board, including Judge Collins, was informed that a hospital in the vicinity of Loyola's land could be a significant investment factor, if the development of the hospital and surrounding acreage were kept under control. According to the district and appellate courts, upon recommendation of the Real Estate Committee, the Board approved a resolution calling for the resumption of negotiations with the St. Jude group.

It should be noted that a verbatim copy of this resolution authorizing Loyola's continued negotiations with the developers of the St. Jude Hospital was sent to all Board members in advance of the November 12, 1981 meeting.

The connection between the rezoning of Loyola's land and the St. Jude Project was discussed with the Board. That the rezoning of Loyola's land was a condition of sale to Liljeberg was made clear to the Board and it was specifically noted by the district and appellate courts, as was the fact of Judge Collins' presence at this critical meeting.

The January 28, 1982 minutes of the Loyola University Board of Trustees contained explicit discussion of the St. Jude Hospital Project. The contents of these minutes inescapably demonstrated Loyola's substantial connection to and interest in the pending litigation:

> "Regarding the negotiations with the St. Jude Hospital Corporation, Mr. Eckholdt

> reported that the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation. If negotiations are brought to a satisfactory conclusion, there is a great likelihood that there will be a major hospital built on the university's property. . ."

These minutes were mailed on March 12, 1982, which was also the day Judge Collins signed the Judgment in favor of Liljeberg.

The report of the Executive Committee meeting, dated March 15, 1982, and mailed to the Board on March 15, 1982, contains a detailed discussion of the terms of the sale of the Monroe Tract property to Liljeberg, including reference to the requirement that Liljeberg secure the rezoning of Loyola's adjacent property.

On March 19, 1982, a personal and confidential memorandum was sent to the members of the Board of Trustees which further explained Loyola University's agreement with Liljeberg, including the accomplishment of Loyola's objective of rezoning its remaining property. According to the district court as affirmed by the Fifth Circuit, the Judge received this correspondence on or about March 21, 1982.

Both courts further found that Judge Collins did not obtain actual knowledge of Loyola's interest until March 24, 1982, at the time he reviewed material that had been sent to him in preparation for the March 25 meeting. Judge Collins controlled the outcome of the case until March 26, 1982 (10 days after March 16, 1982 entry of judgment.) *See*, Fed.R.Civ.P. Rule 52, 59; Petitioner's Appendix B, p. 32a.

On March 25, 1982 Judge Collins is reported as

present at a Board meeting where the details of the agreement between Loyola and Liljeberg were presented by the Executive Committee as well as the Real Estate Committee.

Moise Steeg, an attorney and Chairman of the Board of Trustees of Loyola University during the pertinent period, confirmed the Loyola Board procedures and testified that the sale and management of the Monroe Tract were important financial matters for Loyola, frequently discussed, that he "[didn't] think there was anyone on the board who was not aware of the St. Jude offer," and that all Board members are rather attentive about matters of finances or disposition of real estate.

In sum, well before the March 24, 1982 date of actual (remembered) knowledge found by the district court, and well before the execution of the Agreement to Purchase, Judge Collins had actual (but forgotten) knowledge of Loyola's interest in entering into a purchase agreement with Liljeberg, its interest in Liljeberg's obtaining §1122 approval, its interest in obtaining rezoning of surrounding property through Liljeberg's efforts, and the positive financial effect that this would have on Loyola's property. A reasonable person would be safe in concluding that the Judge voted to resume negotiations with the Liljeberg interests. Moreover, he had been informed that HCA was not the owner of the §1122 approval. The ownership of the corporation holding this approval was *the* issue in the case which was brought by HCA's subsidiary and heard by him only four months after he reacquired actual (but forgotten) knowledge on September 25, 1981.

SUMMARY OF ARGUMENT

As more fully demonstrated below, Petitioner's policy concerns are only remotely related to the particular

facts and issues of this case. Petitioner's contention that litigants and the judicial system itself would suffer by virtue of the Fifth Circuit's decision to vacate a tainted judgment flies in the face of the appellate court's carefully-worded opinion and the rigorous standards set forth therein for interpreting 28 U.S.C. §455(a).

The matter before this Court indeed concerns policy, but the policy at issue is that of ensuring the integrity of the judicial system despite rare potentially adverse effects on a successful litigant. Pursuant to §455(a), even the appearance of impropriety, as seen through the objective eyes of the reasonable person, requires recusal. In light of this statutory purpose, the Fifth Circuit refused to be satisfied by a less stringent standard of judicial conduct, and correctly vacated a judgment where a reasonable person would firmly expect the judge to have known information to which he had been recently exposed on numerous occasions.

ARGUMENT

I.

PETITIONER'S POLICY ARGUMENTS DEPEND UPON UNREASONABLE EXTENSIONS OF THE FIFTH CIRCUIT OPINION.

In enumerating all the possible adverse consequences that could ensue from the Fifth Circuit's opinion, Petitioner fails to acknowledge the safeguards built into the decision which prevent the opening of the floodgates he predicts.[3] First, the Fifth Circuit decision will only affect

[3] Petitioner even concedes that the Fifth Circuit imposes a timeliness requirement on motions brought on §455(a) grounds, but does not mention the fact that such a requirement minimizes the risk of a dissatisfied litigant abusing §455(a) to obtain a second bite at the apple.

the finality of those judgments rendered by a judge where an objective observer would *firmly expect* that he had actual knowledge of interest in the case. The Fifth Circuit, acknowledging the harsh consequences that can result from post-judgment motions to vacate based upon recusal grounds, emphasized that knowledge of facts requiring recusal should not be lightly imputed to a judge.

> "Where a reasonable person would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist." Petitioner's Appendix A, p. 12a.

Accordingly, the type of constructive knowledge required before the limited rule of the Fifth Circuit will be applied is not that which represents a value judgment about what a person of a certain age and with a certain educational background should know, as one might expect in a tort action. Rather its rule contemplates a situation in which a reasonable person is unable to come forward with a plausible and objectively ascertainable explanation for lack of knowledge, in light of specific facts and circumstances militating in favor of a finding of actual knowledge.

Petitioner asserts that the theory of constructive knowledge adopted by the Fifth Circuit stretches §455(a) "past the breaking point, effectively requiring a judge to recuse himself *sua sponte* based on facts that he does not know." This glib formulation is typical of Petitioner's analysis of the Fifth Circuit opinion where all possibilities are taken to their extreme, omitting mitigating variables that necessarily must figure into any reasoned equation. The actual effect of the Fifth Circuit decision on judges is to require them to be even more diligent about informing themselves of their own interests. Moreover, this decision

does not stand for the proposition that judges must perform the impossible, but rather serves as important precedent for the sound policy that if a judge is frequently exposed to written and oral communications about which he has a judicial and fiduciary duty to know, under circumstances in which the reasonable observer would firmly expect him to retain this knowledge, any judgment rendered by him related to this knowledge risks being set aside.

Clearly, constructive knowledge in its broadest sense can be found in many different situations. However, the Fifth Circuit definition applies only to rare occurrences. If, under the carefully delineated rule adopted by the appellate court, constructive knowledge did not require recusal and vacation of judgment, the entire judicial system would be turned on its head, holding judges to the lowest standard of conduct, excusable by their use of the simple phrase: "I didn't know."

In further considering the effects of the Fifth Circuit's ruling, Petitioner maintains that the decision "introduces a capriciousness to judicial actions that disserves judges and litigants alike." The thought underlying this assertion is that litigants and judges could not be certain of the finality of their judgments because dissatisfied litigants would flock to the Clerk's Office with groundless motions to recuse and vacate. But, this is not a realistic scenario. Lawyers intending to continue practice in the particular district would be most reluctant to bring a motion to recuse or vacate unless such pleadings were supported by extremely sound grounds. Lawyers who did not fear the damage to their professional reputations which would result from frivolous motions to recuse or vacate would have their boldness curbed by the specter of Rule 11

sanctions. Most importantly, however, Petitioner's fear that the Fifth Circuit's rule requiring recusal in circumstances where there is a clear appearance of impropriety would lead to an *en masse* rush to the courthouse by disgruntled parties has already proved itself to be unfounded.

The Fifth Circuit's experience with the challenged rule is the best evidence that it does not lead to the adverse consequences described by Petitioner. In *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976), see discussion *infra*, the Fifth Circuit handed down a celebrated decision announcing its vacating of a judgment where there was only an appearance of impropriety. Indeed there, as in the present matter, the existence of prejudice was strenuously denied by the trial judge. Since that time, the only other cases of which we are aware decided on this basis are *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) and the one currently before this Court. If this rule had indeed opened the Pandora's Box foreseen by Petitioner, the Fifth Circuit would surely have discovered it in the ten years since the much heralded *Brown* decision, and might have been more inclined to adopt the position advocated by Liljeberg. However, as amply demonstrated by this case, the Fifth Circuit has unswervingly adhered to its previously articulated rule.

Finally, although finality of judgments is a vital concern in the sound administration of justice, it is not the ultimate goal as is best shown by the adoption of Rule 60 of the Federal Rules of Civil Procedure. The existence of Rule 60 is clear evidence of the fact that Congress and this Court have determined that some judgments, even final ones, should not stand.

II.

PETITIONER'S ALLEGED HARM DOES NOT JUSTIFY EROSION OF 28 U.S.C. §455(a).

The judicial disqualification statute is designed to maintain the unassailable sanctity of the judiciary, and to promote public confidence in the impartiality and trustworthiness of those who sit on the federal bench. For this reason, the appearance of impartiality and propriety is as important as its actuality. Petitioner has attempted to deflect this Court's focus from the policy underlying §455(a) to the alleged harm that he will sustain unless certiorari is granted. The correct analysis would be to balance the interests of all litigants in a reliable, trustworthy and untainted judiciary against the very limited scenario in which an individual litigant could possibly be harmed by the Fifth Circuit rule. Once again, Petitioner has developed a policy argument that is not grounded in the facts of this particular case. The harm that Liljeberg contends he would suffer unless the Fifth Circuit rule is rejected is in reality a direct consequence of the following actions taken at his own peril.

On March 19, 1982, a mere three days after entry of Judge Collins' March 12, 1982 judgment and before the delays for new trial had even run, Liljeberg, as president of Axel Realty, Inc. (his real estate company), entered into a purchase agreement with Loyola University for the purchase of 81 acres of land for over $7,000,000 for the building of St. Jude Hospital. (The sale of this property by Loyola to St. Jude took place on March 15, 1983). Liljeberg also admits in his appellate brief submitted in connection with *Health Services Acquisition Corp. v. Liljeberg*, 691

F.2d 500 (5th Cir. 1982) (unpublished opinion) that he introduced ordinances before the Kenner City Council to have the land zoned for hospital purposes. On July 16, 1982, a solicitation letter, questionnaire and pamphlet were sent to a large number of physicians practicing in the vicinity in which Liljeberg intended to build, concerning "The St. Jude Hospital Complex of Kenner, conceived and developed by Mr. John Liljeberg." Furthermore, at the time of the Kenner City Council rezoning hearing, HSAC advised the Kenner City Council by letter that an appeal was pending over the ownership of the St. Jude corporation. HSAC further asserted in its letter its right to the §1122 approval and its intent to judicially contest any assertion to the contrary. Liljeberg not only was aware of HSAC's position, but also attached a copy of its letter to his Fifth Circuit brief on the merits. All these steps were taken by Liljeberg even prior to the hearing before the Fifth Circuit on the merits of the case. Thus, his claims of detrimental reliance on a final judgment are not well-founded as his actions to build a hospital proceeded without any apparent regard to HSAC's appeal. Furthermore, the judgment entered by the Fifth Circuit on October 18, 1982, did not become final until the time for writ application to the Supreme Court had run on January 16, 1983. Within two weeks, HSAC filed a second suit contesting the validity of the issuance of the §1122 approval which was hand-delivered to Liljeberg. That suit is still at the motion stage. Thus any actions taken by Liljeberg up until now were done while appeal rights on the first suit were pending or while a second suit was pending related to the §1122 approval, except for an approximate two-week period. His claim of detrimental reliance on the judgment is belied by the facts.

Liljeberg's determination to move as quickly as possible with the building of a hospital was not apparently affected by judicial developments. He proceeded from the beginning as if there were no serious contest as to the ownership of St. Jude. The harm he claims, therefore, is not the result of the vacating of a tainted judgment upon which he relied to his detriment, for he was on notice at all pertinent times of HSAC's claims to the corporation and the certificate of §1122 approval issued in its name. Further, Petitioner alludes to the harm that would result from a judgment that "the right to build the hospital had belonged to respondent all along." Petition For Writ of Certiorari, p. 10. Petitioner evidently misconstrues the nature of the rights conferred upon the holder of a certificate of approval issued pursuant to Section 1122 of the Social Security Act (42 U.S.C. §1320a-1). Such an approval merely entitles the facility to collect federal reimbursement through the Medicare and Medicaid Programs (Titles XVIII and XIX of the Social Security Act) for a portion of the interest and depreciation associated with a capital expenditure. Although this reimbursement can be a significant amount, the approval itself has no bearing whatsoever on the "right to construct" a hospital facility. Petitioner has the right to build a hospital in Louisiana with or without § 1122 approval.

The vacation of the judgment rendered by Judge Collins will neither cause the magnitude of harm described by Petitioner nor constitute the sole cause of harm for which Petitioner himself must claim a large measure of responsibility. Additionally, of course, the vacating of Judge Collins' judgment would merely require that HSAC's claims be retried, not that Petitioner would lose on the merits of the lawsuit.

III.

THE PURPOSE OF THE REASONABLE MAN STANDARD IS UNDERMINED BY PETITIONER'S ARGUMENT.

An attorney or party-litigant should not be placed in the position of having to probe into the presiding judge's state of mind, memory, forgetfulness, and credibility. Yet, this is precisely what is called for by Petitioner's reading of §455. According to Petitioner's formulation of the recusal law, a litigant must be able to prove, in accordance with an unarticulated standard of proof, that a judge is actually biased or partial or has actual knowledge of his interest. How is this to be done? Does one call upon character witnesses to testify as to the judge's veracity? Does one subpoena the judge's personal files and records? Does one subpoena eye witnesses? What happens in the rare event that the judge's personal files and records conflict with his testimony as to his state of mind?

If proof must be had of actual bias or actual knowledge of interest, an attorney or litigant will find himself in the position of putting the judge on trial. For this reason, a reasonable man standard has been adopted as an intellectual construct interposed between the judge and a party-litigant which insulates both from the above described predicament.

Furthermore, Petitioner's argument is circuitous, for one can only know whether there is actual bias or actual knowledge of interest when evidence is adduced thereon and a decision is made based upon the proof. This proof would in all likelihood include but not be limited to the

judge's testimony. Nonetheless, Petitioner would constrain the reasonable man to accept the truth based solely on the individual judge's testimony as to his state of mind. If such blanket acceptance of testimony were mandated, it would eviscerate the reasonable man standard. All that would be required would be to ask the judge, "What did you know?" or "Were you biased?" There would be no reasonable man analysis, for one would be bound to accept the judge's testimony at face value and without question.

The reasonable man standard selected by Congress wisely does away with both of these untenable situations – one where a litigant is forced to put on trial a judge's veracity and one in which a litigant is bound to blindly accept the judge's word. The reasonable man standard bridges these two extremes, and provides a standard for resolution of the thorny dilemmas posed by judicial disqualification.

In this case, for instance, in light of all the evidence suggesting knowledge at the time of trial, the Fifth Circuit found that a reasonable man would have expected Judge Collins to recall some facts pertaining to the connection between Loyola and Liljeberg, and to inquire as to the nature of the connection:

> "Judge Collins attended a number of meetings in which Loyola's negotiations with Liljeberg and St. Jude were discussed. These meetings took place as late as November 1981, just two months before the trial. Furthermore, Judge Collins was sent written material which clearly disclosed Loyola's interest in the litigation. At the very least, a reasonable observer would expect that Judge Collins would remember that Loyola had

> had some dealings with Liljeberg and St. Jude and seek to ascertain the nature of these dealings." Petitioner's Appendix A, pp. 12a-13a.

A reasonable person would be at a loss to explain why a judge who is legally bound to know of his own interests would fail to recall information to which he had been recently exposed on a number of occasions, and of which he as a fiduciary of an organization should be aware.

Furthermore, a reasonable person would, in all likelihood, wonder about the effect, if any, of the Judge's prior knowledge of the relationship between Liljeberg and Loyola and his continued exposure to this information upon his perceptions and cognitive processes. One's perceptions are frequently subconsciously colored by information and experiences of which one is not actively aware.

A reasonable person would also question why Judge Collins remained silent on March 24, 1982, when he obtained "actual knowledge"of Loyola's interest in the litigation. The claim that the Judge's knowledge did not impact the judgment is of no moment, for the concept of harmless error has no applicability to recusal issues. 13 C. Wright, A. M. Miller and E. Cooper, *Federal Practice and Procedure* §3553 (1975). Additionally, Judge Collins' failure to disclose his interest upon gaining actual knowledge is not justified by the suggestion that HSAC would only have been accorded the right to make potentially futile post-trial motions before a different judge. In fact, at that time, if Judge Collins had disclosed the information that HSAC learned subsequently from another source, HSAC could have immediately brought a Rule 60(b)(6) motion. The timeliness issue raised by Liljeberg would have been nonexistent. Moreover, Liljeberg would have been on immediate

notice as to the existence of serious problems with the judgment. Most importantly, if the Rule 60(b)(6) motion had been brought at that time, the merits of the case and Judge Collins' denial of the motion to vacate would likely have been heard together on appeal via Federal Rule of Appellate Procedure 3(b) allowing for consolidated appeals. The joinder of the case on the merits and the recusal issue might well have affected the appellate court's view of the factual determinations reached by the lower court where the credibility of witnesses was such a crucial issue. *See, State of Idaho v. Freeman*, 507 F. Supp. 706, 728 (D. Idaho 1981).

It is precisely this endless chain of "what if" questions raised by Judge Collins' continued participation in this case, and his silence on learning of his interest, that infects the judgment in the eyes of the reasonable man and that makes the preservation of the appearance of propriety and impartiality equally as important as its actuality.

Petitioner argues vigorously that a judgment should be set aside retroactively from the time of a motion to recuse only where there has been actual bias or actual impropriety (completely ignoring the possibility of imputation where required by the facts).[4] However, Petitioner

[4] Petitioner fails to consider Footnote 3 in *United States v. Murphy*, 768 F.2d 1518, 1539 n. 3 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986), where the Seventh Circuit casts *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), as a case of actual bias by imputation even though no actual bias on the part of the judge was ever shown:

> "In *Hall*, a magistrate's law clerk accepted employment with the plaintiff's law firm and thereafter worked on the magistrate's opinion. The clerk also had been a member of the plaintiff class. The court thought this required the magistrate's opinion to be set aside, although no motion was made until after the opinion was released. We think that *Hall* is best understood as a case of actual bias (of the clerk) imputed to the court, not simply as an appearance case."

United States v. Murphy, 768 F.2d at 1539, n. 3.

The Seventh Circuit did not express any disagreement with the result reached by the Fifth Circuit, and expressly acknowledged the possibility of imputing bias to the judge under appropriate circumstances, even where no actual bias has been shown. Thus, Petitioner's reading of the Seventh Circuit's rule may very well be more rigid than that which the Seventh Circuit contemplates.

The *Murphy* decision, upon which Petitioner's arguments are based, is too factually dissimilar to lend any guidance to this case. In *Murphy*, the trial judge and chief prosecuting attorney had been friends for years before the trial, a fact well known by Murphy's defense counsel. Subsequent to sentencing, Murphy filed a motion seeking the judge's recusal under §455(a) based on "recent" knowledge of a vacation taken by the judge and prosecutor after trial. The *Murphy* court correctly held that the motion was brought too late because the grounds for recusal had been known for too long before the bringing of the motion. It does not speak directly to the situation presented here, namely the timely bringing of a motion to vacate shortly after knowledge of the recusal grounds. The court does, however, offer this guidance as to the proper result to be reached where the parties are not aware of recusal grounds before trial:

> "A judicial impropriety serious enough, and secret enough, to escape everyone's notice before trial probably also would be serious enough to create an actual conflict of interest." *Id.* at 1541.

Consistent with its comments on *Hall* discussed above, the Seventh Circuit once again shows its inclination to impute actual bias in appropriate circumstances.

never discloses what constitutes actual bias or actual impropriety, what consequences obtain for the parties and their attorneys in being forced to prove it, and what result is to be reached when many facts and circumstances point in the direction of actual partiality or impropriety and the testimony of the judge points in the other direction.

Petitioner's rigid interpretation of the Seventh Circuit rule is unworkable, in that it pits litigants and their counsel against the judge and places the judge in the untenable position of being the ultimate judge and witness as to his own conduct. Clearly, the reasonable man standard is preferable to these two alternatives.

IV.

PETITIONER'S INTERPRETATION OF 28 U.S.C. §455(a) DOES NOT LEND ITSELF TO APPLICATION IN ALL CASES.

Petitioner's analysis is both pragmatic and expedient for it leaves very little "gray area," and purports to provide the quick and easy solution for all cases. In reality, only two determinations are required to decide if a judgment is to be vacated pursuant to §455(a) – (1) whether the motion to recuse was brought before or after entry of judgment, and (2) if it was brought after, whether there was actual bias.[5] As is frequently the problem with formulaic

[5] Indeed, this Court has already ruled that the vacating of judgment is the proper remedy where only an appearance of bias exists, even when a challenge was not brought until after an unfavorable award against complainant. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1969), a losing party moved to set aside an award when he learned, *after the award*, of grounds suggesting the appearance of bias. This Court refused to impute improper motives to the arbitrator, but nonetheless ruled that ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid the appearance of bias." This Court, therefore, set aside the award of a three-man panel even though its inquiry was addressed to only one member of the panel.

This case was specifically identified as a source of §455(a) in the statements of John P. Frank, Esq. at the Hearings on S. 1553 and S. 1886 before the United States Senate, Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 93rd Cong., 1st Sess. 33-34 (1971) and the Hearing on S. 1064 before the United States House of Representatives, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, 93rd Cong., 2d Sess. 11 (1974).

responses to difficult questions, the blind application of the rule to *all* §455(a) cases can produce untoward results, as shown by examination of several examples.

Petitioner correctly informs the Court that this is not a case like *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), where the interest of the judge was "direct, personal, substantial [and] pecuniary." *Id.* at 1586, quoting *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). However, Petitioner makes no further attempt to reconcile the result reached in *Lavoie* with the analysis he advocates. In *Lavoie*, which was decided on due process grounds, the judgment entered by the Alabama Supreme Court was vacated retroactively where there was no evidence of actual bias. This Court underscored the importance of preserving the appearance of justice:

> "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true' . . . The Due Process Clause may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'." *Id.* at 1587 (citations omitted).

This Court did not perceive that its decision set forth the most stringent requirements possible regarding judicial disqualification. Rather, *Lavoie* delineates only the outer contours of that which is constitutionally mandated:

> "We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. *The Due Process Clause demarks only the outer boundaries of judicial disqualifications.* Congress and the States, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated today." *Id.* at 1589 (emphasis added).

Implicit in this caveat is the proposition that statutory requirements may be imposed which are even more rigorous than that which is constitutionally required.

This Court found no need to view *Lavoie* in a prospective-versus-retroactive framework. If *Lavoie* had been viewed according to Petitioner's analysis, the judgment rendered by the Alabama Supreme Court could not have been vacated, absent actual bias, for the motion was made after the judgment had been entered. Further, according to Petitioner's reading of the Seventh Circuit rule, *Lavoie* would be categorized as an appearance of impropriety or partiality case, for no actual bias was ever shown. This would therefore preclude the possibility of retroactive vacating of judgment.

Petitioner would be hard-pressed to rationalize the correctness of prospective vacation of judgment from the time of the motion in the *Lavoie* case, because the judge knew of his conflict of interest prior to the rendition of the Alabama Supreme Court's opinion and prior to the time the

motion to recuse was made. Nonetheless, absent a *showing* of actual bias, Petitioner would argue that the judgment should be allowed to stand. This Court has already disagreed with Petitioner's argument, wisely deciding that even absent cold, hard proof, where the appearance of justice is so blemished as to cast doubt upon the justice actually done, a judgment must be vacated.

Lavoie clearly shows that Petitioner's interpretation of the Seventh Circuit rule does not lend itself to all cases, particularly those where the appearance of bias or impropriety is so strong that the judgment is tainted thereby even absent proof of actual bias. In such cases, as further discussed in the concurring opinion of Justices Blackmun and Marshall, the concept of harmless error has no application, and vacation of judgment on the basis of potential harm is appropriate. *Id.* at 1591.

The weaknesses in Petitioner's argument that a prospective-versus-retroactive analysis should be automatically applied irrespective of the particular factual circumstances giving rise to a recusal question are further illustrated by attempting to apply it to two other cases, *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980) and *United States v. Brown*, *supra*.

In Roberts, plaintiff brought suit against the United States Postal Service, charging that her superiors at the Knoxville, Tennessee Post Office had subjected her to a pattern of sex discrimination in violation of 42 U.S.C. §2000e-16 (1976). At a pretrial hearing, the district judge granted a motion to dismiss the Knoxville Postmaster and to substitute the Postmaster General of the United States in his place. At that time, the district judge commented

that "I know Mr. Graves [the Knoxville Postmaster], and he is an honorable man and I know he would never intentionally discriminate against anybody." *Id.* at 127. Plaintiff's counsel filed a motion for recusal which the district court denied, on the basis that 28 U.S.C. §144 requires the party, not his lawyer, to execute the affidavit. Although the Sixth Circuit found no error in this ruling on §144, it nonetheless vacated the judgment rendered after the bench trial because the judge had failed to recuse himself in accordance with his independent duty arising under 28 U.S.C. §455(a). The Sixth Circuit, discerning no actual bias or actual impropriety, vacated the judgment in order to preserve the judiciary's paramount concern with the appearance of impartiality:

> "Once the District Judge expressed his ardent sentiments about Postmaster Graves' character, the objective appearance of impartiality vanished.
>
> We intimate no opinion regarding the actual impartiality of the District Judge. Instead, it is the appearance of impartiality with which we are concerned. As the Supreme Court has written, 'justice must satisfy the appearance of justice.' Clearly, under §455(a), the District Judge had a duty to recuse himself in order to preserve the indispensable semblance of fairness.
>
> Accordingly, the judgment of the District Court is vacated . . ." *Id.* at 129-130.

Petitioner could with relative ease fit the *Roberts* decision into his analysis of the Seventh Circuit framework and justify the vacation of judgment on the ground that relief runs prospectively from the time a motion to recuse

has been brought. According to Petitioner's reading of the Seventh Circuit rule, since the motion to recuse was made prior to trial, vacation of the judgment was appropriate even though no actual partiality or impropriety was shown.

One cannot help but question the wisdom of Petitioner's argument as applied to this case if, for example, the judge had made this same remark to a third party, and the plaintiff only found out about it after trial. Under a narrow reading of the Seventh Circuit rule, the mere fact that the judge made this remark out of the presence of the litigant would deprive the plaintiff in this case of the right to set aside the judgment. This result commanded by such an interpretation of the Seventh Circuit rule reveals its inherent flaw. The judgment rendered in this hypothetical situation would be no less suspect merely because the judge happened to make his remark out of the hearing range of a party with the ability to bring a motion to recuse. Further, there is no logical explanation for these different results, and they bear no rational relationship to the purposes underlying §455(a).

Similarly, if Petitioner applies his rigid reading of the Seventh Circuit rule to *United States v. Brown, supra,* a clearly undesirable result would obtain. The relevant facts are as follows.

In May of 1968, H. Rap Brown was convicted of violating the Federal Firearms Act, and was sentenced to five years' imprisonment and fined $2,000.00. His conviction was affirmed by the Fifth Circuit on August 22, 1973. In May of 1974, James B. Lake, Jr., a patent attorney, wrote to Brown's lawyer, and stated that prior to

appellant's trial in 1968, Lake had met the trial judge at a meeting of the Louisiana State Bar Association at the Buena Vista Motel in Biloxi, Mississippi. Lake further stated that while they were sitting around the swimming pool, he heard the judge say that he was going to preside at Brown's trial and "that he was going to get that nigger." *Id.* at 468. Shortly after receipt of Lake's letter, appellant filed a motion to vacate his conviction and sentence, or alternatively to correct or reduce the penalties imposed by the trial court. The motion was heard by another judge who heard Lake's testimony as well as that of the original judge. The judge testified that he could not remember the particular statement, but denied that he would ever make such a remark:

> "When asked if he ever made such a statement, the judge answered:
>
> 'I can't remember what statement I made at that time but I would categorically deny that I would make such a statement.' " *Id.* at 468.

In his written opinion of September 15, 1975, Judge Cassibry denied Brown's motions, concluding that the trial judge's comment cast a serious shadow on the appearance of justice, but did not prejudice the fairness of the trial itself. The Fifth Circuit reversed Judge Cassibry and vacated the eight-year-old conviction and sentence, finding the trial judge's statement inconsistent with the goal of preserving the appearance of justice codified in 28 U.S.C. §455(a):

> "The judge's statement did not comport with the appearance of justice, and it cannot be said from the record alone that appellant received a fair

> trial. Accordingly, the conviction and sentence must be vacated." *Id.* at 470.

If Petitioner's argument were applied to the facts of the *Brown* case, the original judgment would stand, because relief would run prospectively from the time of the motion to recuse or vacate (which was brought more than six years from the date of judgment), and because there was no definitive finding of any actual bias. Moreover, according to Petitioner's reasoning, because the judge had no recollection of making the statement at issue and categorically denied the possibility of ever having uttered such words, a reasonable person could not possibly harbor doubts about the judge's actual impartiality.

In sharp contrast to Petitioner's hypothesis about the adverse impact of the Fifth Circuit's ruling in this case on the administration of justice (which is belied by the Fifth Circuit's experience), the application to *Brown* of the unyielding interpretation of the Seventh Circuit rule vividly illustrates the miscarriage of justice that acceptance of Petitioner's argument could engender. Public confidence in the impartiality of the judicial process, one of the overriding goals of §455(a), would be shaken to its very foundation if Petitioner's formula were applied to this case.

CONCLUSION

For the above and foregoing reasons, therefore, it is respectfully submitted that this Honorable Court should deny the Petition for Writ of Certiorari. The Fifth Circuit's decision in this case can be readily reconciled with the decisions of the Seventh Circuit and is entirely consistent with the intent and purpose of 28 U.S.C. §455(a).

Respectfully submitted,

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LISTING OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES OF HEALTH SERVICES ACQUISITION CORP. PURSUANT TO SUPREME COURT RULE 28.1.

Parent Companies of Health Services Acquisition Corp.:
Hospital Corporation of America (50%)
General Health Services, Inc. (Wholly-owned by Hospital Corporation of America) (50%)

Hospitals Owned and Operated By:

Health Services Acquisition Corp. (see following listing for Corporations whose stock is owned by Health Services Acquisition Corp.)

Chino Community Hospital, Chino, California
Community Hospital of Gardena, Gardena, California
Encino Hospital, Encino, California
Rockford Center, Wilmington, Delaware
St. Augustine General Hospital, St. Augustine, Florida
Truckee Meadows Hospital, Reno, Nevada
Truckee Meadows Hospital - North, Sparks, Nevada

Hospital Corporation of America
Direct and Indirect Subsidiaries
and Affiliates as of January 26, 1987:

NAME OF CORPORATION	STOCKHOLDER
ALABAMA	
Autauga Acquisition Corp.	HCA
Community Hospital of Andalusia, Inc.	HCA
Crestwood Hospital and Nursing Home, Inc.	HCA
Diamondhead Development Corporation	HCA (90%)

Doctors Hospital of Mobile, Inc.	HCA
Hartselle Medical Center, Inc.	HCA
HCA Health Network of Alabama, Inc.	HCA
HCA Health Services of Alabama, Inc.	Health Services Acquisition Corp.
Montgomery Center for Psychiatry, Inc.	HCA
Pineview Community Hospital, Inc.	HCA
Prattville Acquisition Corp.	HCA
Primary Care Services, Inc.	Selma Medical Center Hospital, Inc.
Selma Medical Center Hospital, Inc.	HCA

ARIZONA

HCA Health Services of Arizona, Inc.	HCA
Hospital Corporation of Arizona	HCA

ARKANSAS

Community Hospital of DeQueen, Inc.	HCA
HCA Health Services of Arkansas, Inc.	HCA

CALIFORNIA

Community Hospital of LaHabra, Inc.	HCA
Coordinated Healthcare Systems	Health Services Acquisition Corp. (45%)
Hospital Corporation of California	HCA
HCA Allied Health Services of San Diego, Inc.	HCA
HCA Health Services of California, Inc.	HCA
HCA Hospital Services of San Diego, Inc.	HCA
LE Corporation	Las Encinas Hospital
Las Encinas Hospital	Las Encinas Joint Venture
Las Encinas Joint Venture, Inc.	HCA Psychiatric Company
Los Robles Regional Medical Center	HCA

Orange Medical Complex, Inc.	Health Services Acquisition Corp.
Sebastopol Hospital Corporation	HCA
Ukiah Hospital Corporation	HCA

COLORADO

Colorado Health Care Ventures, Inc.	HCA Health Services of Colorado, Inc.
HCA Health Services of Colorado, Inc.	HCA

DELAWARE

Diagnostic Center Hospital Corp. of Texas	HCA
General Health Services, Inc.	HCA
Global Clinical Pharmacology, Inc.	HCA (20%)
Equicor-Equitable HCA Corporation	HCA Investments, Inc. (50%)
HCA, Inc.	HCA
HCA Healthcare Alliance, Inc.	HCA
HCA Health Services of Midwest, Inc.	Health Services Acquisition Corp.
HCA International, Inc.	HCA
HCA Investments, Inc.	HCA
HCA Management Company, Inc.	HCA
Health Services Acquisition Corp.	HCA/General Health Services, Inc.
Hearing Care of America, Inc.	HCA
Hospital Affiliates Management Corporation	Health Services Acquisition Corp.
Hospital Corporation of America	HCA
Lakeland Manor, Inc.	HCA
University Hospital, Inc.	HCA

DISTRICT OF COLUMBIA

Mental Health, Inc.	Health Services Acquisition Corp.

FLORIDA	
Bay Hospital, Inc.	HCA
Central Florida Regional Hospital, Inc.	HCA
Emergency Medical Systems, Inc.	Pinellas Ambulance Service, Inc.
Florida Health Care Facilities, Inc.	HCA Psychiatric Company
GHS-Largo Hospital, Inc.	General Health Services, Inc.
Grant Center Hospital of Ocala, Inc.	HCA
HAI of Florida, Inc.	Health Services Acquisition Corp.
HCA Family Care Center, Inc.	HCA
HCA Development Corporation of Florida	HCA
HCA of Florida, Inc.	HCA
HCA Health Services of Florida, Inc.	Health Services Acquisition Corp.
HCA Healthcare - Florida, Inc.	HCA Physician Services, Inc.
HCA Physician Services of Palm Beach County, Inc.	HCA Physician Services, Inc.
Hospital Corporation of Lake Worth	HCA
Hospital Development and Service Corp.	HCA
Largo Medical Center, Inc.	HCA
Lake Worth Associates, Inc.	HCA Physician Services (80%)
Lawnwood Medical Center, Inc.	HCA
Marion Community Hospital, Inc.	HCA
Medical Care of Broward, Inc.	HCA
New Port Richey Hospital, Inc.	HCA
Okaloosa Hospital, Inc.	HCA
Okeechobee Hospital, Inc.	HCA
Palm Coast Community Hospital, Inc.	HCA
Pinellas Ambulance Service, Inc.	HCA
Putnam Hospital, Inc.	HCA
Tallahassee Medical Center, Inc.	HCA
Tamarac Hospital Corporation	HCA

University Ambulatory Surgical Center, Inc.	Tamarac Hospital Corp. Inc.
University Psychiatric Center, Inc.	HCA
West Florida Regional Medical Center, Inc.	HCA
GEORGIA	
Clayton Acquisition Corp.	HCA
Coliseum Associates, Inc.	HCA Physician Services, Inc. (80%)
Coliseum Park Hospital, Inc.	HCA
Dublin Community Hospital, Inc.	HCA
HCA Health Services of Georgia, Inc.	HCA
Hahira Acquisition Corp.	HCA
Hospital Affiliates Management Corp. of Georgia	Health Services Acquisition Corp.
Hospital Corporation of Lanier, Inc.	HCA
Medical Center-West, Inc.	HCA
Palmyra Park Hospital, Inc.	HCA
Redmond Park Hospital, Inc.	HCA
West Paces Ferry Hospital, Inc.	HCA
Worth Community Hospital, Inc.	HCA
IDAHO	
HCA of Idaho, Inc.	HCA
INDIANA	
Forum Jeffersonville, Inc.	HCA
HCA Health Services of Indiana, Inc.	HCA
Terre Haute Regional Hospital, Inc.	HCA
IOWA	
HCA Health Services of Iowa, Inc.	HCA
KANSAS	
Galichia Laboratories, Inc.	HCA Health Services of Kansas (95%)
HCA Health Services of Kansas, Inc.	HCA

Midwest Ultrasound Specialists, Inc.	Galichia Laboratories
KENTUCKY	
Bowling Green Surgery Center, Inc.	Hospital Corporation of Kentucky
Community Hospital, Inc.	HCA
Frankfort Hospital, Inc.	HCA
Greenview Hospital, Inc.	HCA
Hospital Affiliates Management Corporation	Health Services Acquisition Corp.
Hospital Corporation of Kentucky	HCA
Hospital Corporation of Morganfield, Inc.	HCA
Springview Hospital, Inc.	HCA
LOUISIANA	
Allied Ambulance Services, Inc.	HCA
Bayou River Medical Hospital Corporation	HCA
HCA Health Services of Louisiana, Inc.	Health Services Acquisition Corp.
Lakeside Associates, Inc.	HCA Physician Services (80%)
MARYLAND	
HCA Maryland, Inc.	HCA
MASSACHUSETTS	
HCA Health Services of Massachusetts, Inc.	HCA
MISSISSIPPI	
Grant Center Hospital of Mississippi, Inc.	HCA
HCA Health Services of Mississippi, Inc.	HCA
HCA Physician Services of Mississippi, Inc.	HCA

MISSOURI	
The Business and Industry Health Group, Inc.	HCA Health Services of Missouri, Inc. (50%)
Forum Springfield, Inc.	HCA
HCA Health Services of Missouri, Inc.	HCA
Midwest Psychiatric Center, Inc.	HCA Health Services of Missouri, Inc.
NEVADA	
HCA Health Services of Nevada, Inc.	HCA
Physician's Hospital Development Corporation [not wholly owned]	Health Services Acquisition Corp.
NEW JERSEY	
WMH Health, Inc.	Health Services Acquisition Corp.
HCA Health Services of New Jersey, Inc.	HCA
NEW HAMPSHIRE	
HCA Health Services of New Hampshire, Inc.	HCA
NEW MEXICO	
Albuquerque Psychiatric Hospital, Inc.	HCA Psychiatric Company
Guadalupe Medical Center, Inc.	HCA
HCA Health Services of New Mexico, Inc.	Health Services Acquisition Corp.
Hobbs Community Hospital, Inc.	HCA
Lovelace Health Plans, Inc.	HCA Health Services of New Mexico, Inc. (40%)
Lovelace Medical Center, Inc.	HCA Health Services of New Mexico, Inc. (40%)

NEW YORK	
Hospital Affiliates Counseling Corporation of New York	Hospital Affiliates Management Corp.
NORTH CAROLINA	
Cumberland Medical Center, Inc.	HCA Health Services of North Carolina, Inc.
HCA Health Services of North Carolina, Inc.	Health Services Acquisition Corp.
Hospital Corporation of North Carolina	HCA
HCA-Raleigh Community Hospital, Inc.	HCA
Wake Psychiatric Hospital, Inc.	HCA Health Services of North Carolina, Inc.
OKLAHOMA	
HCA Affiliated Services of Oklahoma, Inc.	HCA
HCA Health Services of Oklahoma, Inc.	HCA
Red River Lawton Counseling Center, Inc.	HCA
OREGON	
Allied Clinical Laboratories, Inc.	General Health Services, Inc.
HCA of Oregon, Inc.	HCA
McMinnville Hospital, Inc.	HCA
Roseburg Ambulance, Inc.	HCA of Oregon, Inc.
UMPOUA Medical Building Co.	HCA of Oregon, Inc.
PENNSYLVANIA	
Haverford Hospital Corporation	Health Services Acquisition Corp.
RHODE ISLAND	
HCA Health Services of Rhode Island, Inc.	HCA
Rhode Island Medical Rehabilitation Center, Inc.	HCA Health Services of Rhode Island, Inc. (66 ⅔%)

SOUTH CAROLINA	
Aiken Community Hospital, Inc.	HCA
Chesterfield General Hospital, Inc.	HCA
HCA Healthcare - South Carolina, Inc.	HCA Physician Services, Inc.
HCA South Carolina, Inc.	HCA
Low Country Health Services, Inc. of the Southeast	HCA
Myrtle Beach Hospital, Inc.	HCA
North Trident Regional Hospital, Inc.	HCA
Walterboro Community Hospital, Inc.	HCA
SOUTH DAKOTA	
Hospital Affiliates of South Dakota, Inc.	Health Services Acquisition Corp.
TENNESSEE	
Athens Community Hospital, Inc.	HCA
Bond Hospitals, Inc.	HCA
Bradley Community Hospital, Inc.	HCA
The Center for Health Studies, Inc.	HCA
Community and Occupational Health Services, Inc.	HCA
DeKalb General Hospital, Inc.	HCA
General Care Corp.	HCA
HCA, Inc.	HCA
HCA Development Company, Inc.	HCA
HCA Finance, Inc.	HCA
HCA Government Services, Inc.	HCA
HCA Health Services of Tennessee, Inc.	Health Services Acquisition Corp.
HCA Home and Clinical Services, Inc.	HCA
HCA International Company	HCA
HCA Medical Services, Inc.	HCA
HCA Physician Services, Inc.	HCA
HCA Psychiatric Company	HCA

HCA Properties, Inc.	HCA
HCA Realty, Inc.	HCA
HCA Residential Centers, Inc.	HCA
HE Sales Corp.	Health Enterprises, Inc.
Health Enterprises, Inc.	General Health Services, Inc.
Hospital Affiliates Management Company of Loudon, TN, Inc.	Health Services Acquisition Corp.
Hospital Capital Corporation	HCA
Hospital Corporation of Smith and Overton County	HCA
Hospital Corporation of Tennessee	HCA
Hospital Realty Corporation	HCA
Humboldt Cedar Crest Hospital, Inc.	HCA
Indian Path Hospital, Inc.	HCA
Johnson City Eye & Ear Hospital, Inc.	HCA
Judy's Foods, Inc.	General Care Corp.
Kuron, Inc.	HCA
Medical Park Hospital, Inc.	HCA Psychiatric Company (48%) Area Psychological Clinic, Inc. (52%)
Medical Equipment Management Corp.	HCA Physicians Services, Inc.
Montgomery Convalescent Center, Inc.	HCA
Occupational Health Consultants of America, Inc.	HCA
Parkridge Hospital, Inc.	HCA
Parthenon Casualty Insurance Company	HCA
Parthenon Financial Services, Inc.	HCA
Parthenon Insurance Company	HCA
Parthenon Travel Services, Inc.	Health Enterprises, Inc.
River Park Hospital, Inc.	HCA (77%)
Seniority, Inc.	HCA
Stones River Hospital, Inc.	HCA

TransMed Clinical Services Company	HCA
TransMed Medical Supply Company	HCA
Valley Psychiatric Hospital Corporation	HCA Psychiatric Company

TEXAS

Arlington Diagnostic South, Inc.	HCA
Brownwood Regional Hospital, Inc.	HCA
Coronado Community Hospital, Inc.	HCA
Detar Hospital, Inc.	HCA
El Paso Doctors Hospital, Inc.	HCA Psychiatric Company
El Paso Psychiatric Hospital Inc.	HCA Psychiatric Company
Fort Worth Medical Plaza, Inc.	HCA
Grant-Buie Hospital, Inc.	HCA Health Services of Texas, Inc.
HCA-Arlington, Inc.	HCA
HCA Health Services of Texas, Inc.	Health Services Acquisition Corp.
HCA Medical Center of Plano	HSP of Texas, Inc.
HCA Shared Services of Texas, Inc.	HCA
Highland Park Hospital, Inc.	HCA
Hospital Affiliates Management Corporation	Health Services Acquisition Corp.
HSP of Texas, Inc.	HCA
Lockhart Acquisition Corp.	HCA
Longview Regional Hospital, Inc.	HCA
Navarro Memorial Hospital, Inc.	HCA
Pasadena Bayshore Hospital, Inc.	HCA
Spring Branch Radiation Center, Inc.	HCA
Sun Towers, Inc.	HCA
Tarrant Center, Inc.	HCA
Waco Hospital Corp.	HCA
Woman's Hospital of Texas, Incorporated	HCA
Woodland Heights General Hospital, Inc.	HCA

UTAH	
Brigham City Community Hospital, Inc.	HCA
Castleview Hospital, Inc.	HCA
HCA Group Properties, Inc.	HCA
HCA of Utah, Inc.	HCA
Hospital Corporation of Utah	HCA
Mountain View Hospital, Inc.	HCA
Pioneer Valley Hospital Inc.	HCA
Price Community Hospital, Inc.	HCA
VIRGINIA	
Ambulatory Services Management Corporation of Chesterfield County, Inc.	HCA
Brandermill Medical Ancillaries, Inc.	HCA
Chippenham Hospital, Inc.	HCA
Circle Terrace Hospital Corporation	HCA
HCA Health Services of Norfolk, Inc.	HCA
HCA Health Services of Portsmouth, Inc.	HCA
HCA Health Services of Virginia, Inc.	Health Services Acquisition Corp.
Health Resource Productions, Inc.	HCA Health Services of Virginia, Inc.
Johnston-Willis Hospital, Inc.	HCA
Johnston-Willis Limited	HCA
Lewis-Gale Hospital, Incorporated	HCA
Montgomery County Hospital, Inc.	HCA
Pulaski Community Hospital, Inc.	HCA
WASHINGTON	
Mercy Ambulance Service of Spokane, Inc.	Shepard Ambulance, Inc.
Olympia Hospital Corporation	HCA
Seattle Ambulance Service, Inc.	Shepard Ambulance, Inc.
Shepard Ambulance, Inc.	General Health Services, Inc.

Spokane Ambulance, Inc.	Shepard Ambulance, Inc.
WEST VIRGINIA	
HCA Health Services of West Virginia, Inc.	HCA
HCA Management Company, Inc.	HCA
Hospital Affiliates International, Inc.	HCA
Hospital Corporation of America	HCA (TN)
Kuron, Inc.	HCA
Raleigh General Hospital	HCA
Teays Valley Health Services, Inc.	HCA
Tri Cities Health Services Corp.	HCA
WYOMING	
Wyoming Health Services Inc.	Health Services Acquisition Corp.

FOREIGN SUBSIDIARIES

AUSTRALIA	
Baulkam Hills Private Hospital, PTY, Limited	Hospital Corp. Aus. Pty (699,999 SHS.) Hosp. Corp. Ameri. Ltd. (ISH)
Hospital Corporation Australia, PTY, Limited	Hosp. Corp. of Amer., Ltd.
BERMUDA	
Parthenon Insurance Company, Limited	HCA
BRAZIL	
AMICO-Assistencia Medica a Industria e Comercia Ltda.	HCA International, Inc.

CANADA	
HCA Healthcare of Canada, Inc.	HCA International, Inc.
Hospital Corporation of Canada Limited	HCA
CAYMAN ISLANDS	
HCA International, Ltd.	Hospital Corporation of America, Ltd.
HCA Mideast Ltd.	HCA International, Inc.
HCA Service & Supply Company, Ltd.	Hosp. Corp. of Amer. Ltd.
Health Care International	HCA International, Inc.
Hospital Corporation of America, Ltd.	HCA International, Inc.
Hospital Corporation of America - Panama, Ltd.	HCA International, Inc.
Hospital Corporation of North America, Ltd.	HCA International, Inc.
KURON Corporation	HCA
FRANCE	
Hospital Affiliates of France, S.A.R.L.	Hosp. Affiliates Management Corp. (DE) (198 SHS.) Health Svcs. Acq. Corp. (2 SHS.)
IRELAND	
The Institute of Clinical Pharmacalogy (Ireland) Limited	HCA (20%)
NETHERLANDS ANTILLES	
HCA Finance N.V.	HCA
UNITED KINGDOM	
HCA United Kingdom Limited	HCA International, Inc.

Healthcare Commodities International Limited	HCA International, Inc.
PANAMA	
Clinicas y Hospitales, S.A.	Hosp. Corp. of America-Panama, Ltd.
PHILIPPINES	
Hospital Corporation International (Philippines)	HCA (dormant status)

REPLY

BRIEF

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No. 86-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,
Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-957

JOHN A. LILJEBERG, JR.,
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HEALTH SERVICES ACQUISITION CORP.,
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REPLY BRIEF FOR PETITIONER

The petition in this case raised three separate, though related, questions about the scope of 28 U.S.C. § 455(a), part of the principal federal statute pertaining to judicial disqualification: first, whether the statute authorizes the voiding of acts taken prior to a motion for recusal based solely on an appearance of impropriety; second, whether motions may be made after a judgment has become final; and, third, whether the statute provides for recusal on the grounds of "constructive knowledge." The answers to these questions, which are anything but uniform throughout the circuits, are of considerable importance to both litigants and judges in the federal courts.

In its brief in opposition respondent directly addresses only the first and third of these issues. With regard to the issue of prospective versus retroactive relief, respondent principally contends that the Fifth Circuit is right in

concluding the retroactive relief is permissible, and the Seventh Circuit wrong in concluding it is not. On the issue of "constructive" versus actual knowledge, respondent mainly argues that the lesser standard avoids a delicate inquiry into a judge's state of mind. In our view, these arguments, which are discussed briefly below, make all the more apparent the need for guidance from this Court.

1. Although respondent does devote a footnote to suggesting that the decision below is not truly in conflict with decisions of the Seventh Circuit regarding retroactive relief under section 455(a), Br. in Opp. 20-21 n.4, the suggestion is utterly unconvincing. To rebut it requires only a comparison of the rules set forth by the two circuits. The Fifth Circuit rule is that "a party may move to vacate a judgment based solely on an appearance of partiality existing at the time that the judgment was rendered." Pet. App. 11a. The Seventh Circuit rule is that "[d]isqualification for the appearance of impropriety runs prospectively only; even a successful motion does not vitiate acts taken before the motion was filed." *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985). In deciding the present case, the Fifth Circuit itself seemed to harbor no doubt that the rules were incompatible. Pet. App. 11a-12a.[1]

For the most part, therefore, respondent concentrates on the argument that the Seventh Circuit rule is undesir-

[1] Respondent incorrectly suggests that the Seventh Circuit in *United States v. Murphy*, 768 F.2d 1518 (1985), *cert. denied*, 106 S. Ct. 1188 (1986), based its decision on the fact that "the grounds for recusal had been known for too long before the bringing of the motion." Br. in Opp. 21 n.4. In fact, the particular grounds for the motion (a planned post-trial vacation for the judge with opposing counsel) were not known well in advance of the motion. Moreover, the Seventh Circuit expressly refused to rest its decision on the knowledge, or lack of it, of the moving party, choosing instead to establish the broad rule against retroactive relief in the absence of actual bias or prejudice. *Id.* at 1541.

able.[2] In particular, it takes the position that application of the rule would change the result in several cases where this Court and other federal courts overturned judgments because of improper conduct by a judge. This argument, however, demonstrates a misunderstanding both of the cited cases and of the Seventh Circuit rule.

The approach taken by the Seventh Circuit properly weighs the important interest in not upsetting prior judicial actions against the degree of bias and prejudice present in a particular case. Where a party seeks to invalidate past actions under section 455(a), the court requires more than just circumstantial facts showing an appearance of impropriety; it calls for facts demonstrating actual bias or prejudice against (or in favor of) one of the litigants. The cases cited by respondent are replete with such facts. Thus, in *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986), the judge had a "direct, personal, substantial [and] pecuniary interest" in the outcome of the litigation; and in *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980),[3] and *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976),[4] the judges had a declared

[2] Sections I and III of the brief in opposition, with the exception of pages 20-22, concern the "constructive knowledge" rule, more than the issue of retroactivity. The main argument about retroactivity appears to be contained in Section IV.

[3] In *Roberts* the judge not only knew one of the parties said to have engaged in discrimination but stated his opinion that the party "would never intentionally discriminate against anyone." 625 F.2d at 127. It is also worth noting that in *Roberts* the grounds for recusal were called to the attention of the district court well before judgment was rendered.

[4] In *Brown* the judge was found, despite his lack of recollection, to have said that he was "going to get that nigger." 539 F.2d at 468. Respondent is wrong, therefore, in relying on *Brown* to suggest that litigants will not misuse the rule fashioned below. The potential for abuse of motions like the one in *Brown*, which was based on actual, demonstrated prejudice, is far less than for motions based on mere allegations of an appearance of impropriety, particularly when the appearance itself depends on "constructive knowledge." *See also* note 5, *infra*.

prejudice for or against one of the parties. These sorts of interests are typically sufficient to support disqualification in the federal courts under section 455(b). At the least, they seem more than enough for the Seventh Circuit to employ its "actual bias or prejudice" exception to the rule against retroactivity under section 455(a).

We thus disagree with respondent's view that the Seventh Circuit rule is less faithful to the goals of section 455(a) than that of the Fifth Circuit. In any event, however, there is clear conflict among the circuits, and review by this Court is necessary to resolve that conflict.

2. Respondent also contends that "constructive knowledge" is enough to satisfy section 455(a). This argument, likewise, is unpersuasive.

It is true, as respondent says, that a requirement of actual knowledge may involve questions about when a judge knew of a possible interest and what he knew. But the solution offered by respondent—to presume that the judge had knowledge—is worse than the problem. Not only is it dramatically overinclusive, leading to the invalidation of judgments where the judge was truly not aware of the possible interest, but it removes the incentive for litigants themselves to bring matters to the attention of the judge. If a party must be able to show that a judge had actual knowledge of the relevant facts, he will have a positive reason to seek out the facts on a timely basis and to present them to the court. A standard of "constructive knowledge," on the other hand, permits a litigant to withhold facts and yet later obtain recusal as if he had made the judge aware of them.[5]

[5] Respondent suggests that lawyers will exercise the necessary self-restraint to prevent abuses of section 455(a). The premise is by no means certain; in *Aetna Life Insurance Co. v. Lavoie, supra*, this Court noted that rules regarding disqualification must be drawn narrowly lest "constitutional disqualification arguments . . . quickly become a standard feature of class-action litigation." 106 S. Ct. at 1588. Furthermore, it is far easier to use allegations of "constructive knowledge" as a litigation tool since it allows the lawyer to plead as though the offending interest was unknown to the judge while seeking relief as though it were known.

Respondent fails to address a second shortcoming in its argument: that section 455(b)(4), with its express requirement of knowledge, calls for just the sort of inquiry that respondent finds unacceptable. As pointed out in the petition, *see* Pet. at 18-20, Congress mandated recusal under subsection (b)(4) only when the judge "knows" that he has one of the specified interests. Moreover, in several cases where judges sat without knowing of an interest in the cases before them, recusal was deemed to operate only from the time of actual knowledge. *See, e.g., In re Cement and Concrete Anti-Trust Litigation*, 515 F.Supp. 1076 (D. Ariz. 1981), *mand. denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (1983), and other cases cited at Pet. 19-20. Unless those courts simply failed to understand that recusal at an earlier date was necessary under subsection (a), the outcome in those cases is inconsistent with the position advanced by respondent and endorsed by the court of appeals below.[6]

3. Last Term, in a case arising in state court, this Court had occasion to define more clearly the conditions under which the interests of a judge in litigation before him may be regarded as a violation of the Due Process Clause. *Aetna Life Insurance Co. v. Lavoie, supra.* In holding that a judge may not sit in a case in which he has an important personal financial interest, the Court declined to fashion a broad constitutional prohibition

[6] Although respondent says that disclosure by Judge Collins upon gaining actual knowledge (eight days after entry of judgment) would have allowed it to make a motion for a new trial based upon that knowledge, the Fifth Circuit expressly rejected that argument. Pet. App. 9a ("HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make"). The standard of "constructive knowledge" was thus an essential part of the Fifth Circuit's willingness to overturn the judgment in this case.

based upon charges of bias and prejudice. The Court noted that "[c]ertainly only in the most extreme of cases would disqualification on this basis be constitutionally required." 106 S. Ct. at 1585. As a result, it is evident that the vast majority of motions seeking disqualification will rest on statutory grounds, not constitutional ones.

The statute at issue in this case, 28 U.S.C. § 455, has become the principal federal statute governing recusal of federal judges. If application of this statute is to be on something more than an *ad hoc* basis from circuit to circuit, it is necessary that litigants and judges be aware of when its provisions may and may not be invoked. The questions presented in this case are central to this inquiry: when motions for recusal are permitted; what the effect of successful motions should be; what type of knowledge (real or imputed) is necessary for a violation; and what weight should be given to finality of judgments. Review by this Court of these important questions is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT

APPENDIX

Supreme Court, U.S.
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No. 86-957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN A. LILJEBERG, JR.,
Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 8, 1986
CERTIORARI GRANTED MARCH 9, 1986

EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

No. 81-4714

HEALTH SERVICES ACQUISITION CORP.,
Plaintiffs

v.

JOHN A. LILJEBERG, JR.,
Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
11/30/81	1	COMPLAINT—issd 1 summs.
12-11-81	5	Complaint for Injunction & retraining order —denied. (RFC) ent. 12-17-81
12-11-81	16	Answer of John A. Liljeberg, Jr.
12-31-81	17	Answer of Health Services Acquisition Corp. and Hospital Corporation of America to third party
12-31-81	18	Answer of Health Services Acquisition Corp. and Hospital Corporation of America to Complaint
1-4-82	19	First amd. complaint for injunction & order allowing same. (RFC) 12-28-81 ent. 1-5-82
1-4-82	20	First amd. answer of deft. John A. Liljeberg, Jr. & order allowing same. (RFC) ent. 12-28-81 ent. 1-5-82
1-6-82	23	First amd. answer of Health Services Acquisition Corp. and Hospital Corp of America to counterclaim and third party demand & order allowing same. (RFC) 1-7-82
1-8-82	26	Deft's 2nd amended answer & ORDER allowing same; (RFC 1-8-82) ent 1-13-82.

DATE	NR.	PROCEEDINGS
1-21-82	46	TRIAL: Witnesses testify. Court adjourns until 1-22-82.
		TRIAL: 1-22-82 cont. from 1-21-82—Witnesses continue. Court to write findings of fact and conclusions of law. Court adjourns. (RFC) ent. 2-3-82
3-15-82	48	OPINION—RFC 3-12-82 ent. 3-16-82
3-15-82	49	JUDGMENT—ORDERED that judgment shall be entered in favor of deft. and against pltf, dismissing this matter. IT IS FURTHER ORDERED that the complt. for injunction filed by deft. against pltf. and third-party deft. is DISMISSED. Each party shall bear its own costs. RFC 3-12-82 ent. 3-16-82.
4-8-82	61	Pltf's ntc of appeal.
11-23-82	63	JUDGMENT from Fifth Circuit affirming decision of D. C.; RUBIN, RANDALL & JOLLY DKTD 11-23-82.
8/24/83	xx	Pltf's Mtn for Disqualification of Judge for Interest Pur to 28 USC 455(b)(4) & alternatively 28 USC 455(a); hrg set 9/14/83 at 9am.
9/15/83	76	ORDERED that hrg on Mtn for Disqualification of Judge for Interest Pur to 28 USC 455(b)(4) & Alternatively 28 USC 455(a) will be heard for argument on 9/14/83 at 9 am. (RFC) 9/13/83 dktd 9/15/83
9/14/83	77	Hrg on Mtn for Disqualification of Judge for Interest Pur to 28 USC 455(b)(4) and alternatively 28 USC 455(a). Depos of John Eckholdt—ADMITTED. Pltf offers confidential memo w/attachs & further moves that this exhibit be sealed—so ORDERED. Ct recalls order alloting this matter to another section of Ct. Ct. denies mtn. (RFC) dktd 9/21/83 (RE: 83-3031)

DATE	NR.	PROCEEDINGS
9/27/83	78	Pltf's Mtn to Vacate Judgment & Reallot for New Trial; hrg set for 10/12/83 at 9am.
10/7/83	82	M.E. 10/4/83: (See M.E. for details) Ct will DENY pltf's mtn for disqualification of Judge. (RFC) 10/7/83 (RE: 83-3031)
10/12/83	83	Hrg on pltf's mtn to vacate judgt and reallott for new trial DENIED. DKTD 10/17/83.
10/20/83	84	NOTICE OF APPEAL.
12/9/83	86	M.E. 12/9/83: Matter before Ct on mtn to vacate judgment, filed by counsel for pltf, Health Services Acquisition Corp. Judgment will not be vacated. Accordingly, Ct will DENY pltf's mtn to vacate. (RFC) dkted 12/9/83
11-14-84	90	JUDGMENT (5th Cir) reversing judgment of Dist Ct and remanding. Dktd 12-17-84
6-28-85	108	ME(CS) Stat conf held 6-27-85, parties to appear 7-19-85 9 AM to provide prel submissions re issue of Judge Collins' knowledge of transactions in question to enable this Ct to make determinations required by 5th Circuit's per curiam of 10-10-84 Dktd 7-1-85
12-27-85	128	Opinion—Court concludes Judge Collins did not have any knowledge requiring his recusal. (CSjr) dktd 12-30-85.
12-30-85	129	ORDERED that Judge Collins' denial of mtn to recuse is AFFIRMED. (CSJr) dktd 12-30-85.
		CLOSED CASE
1-15-86	134	M.E. 1-15-86: Pltf's mtn to alter or amend judgment is GRANTED. Clerk is ordered to amend judgment. (CSjr) dktd 1-15-86.

DATE	NR.	PROCEEDINGS
1-16-86	135	Amended Order—ORDERED that Court's Order entered on 12-30-85 is amended as follows: "IT IS ORDERED that Health Services Acquisition's mtn to vacate judg & reallot for new trial is hereby DENIED." (CSjr) 1-15-86 dkt 1-16-86.
1-21-86	136	Notice of appeal of Health Services from final Order as amended, entered on 1-16-86.
9-22-86	138	Judgment from 5th Circuit—Ordered that orig judg of D.C. is vacated & suppl order of D.C. is reversed, cause is REMANDED to D.C. (Clark, Garza & Johnson) Issd as mandate 9-19-86.
		REOPENED

Form No. 10 (Rev. 1-81)

FINANCIAL DISCLOSURE REPORT

ANNUAL REPORT DUE BY MAY 15 FROM JUDICIAL OFFICERS AND CERTAIN JUDICIAL EMPLOYEES PER 28 USCA App. 4 §101 et seq.

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)	COURT OR ORGANIZATION	REPORT DUE DATE
COLLINS, ROBERT F.	United States District Court Eastern District of Louisiana	5/15/81
TITLE: JUDGE	NEW EMPLOYEE ONLY-DATE OF ENTRY ON DUTY	IF REPORT IS FOR PERIOD OTHER THAN CALENDAR YR., GIVE PERIOD BELOW
HOME OR OFFICE ADDRESS: 500 Camp Street, Suite 465, New Orleans, Louisiana 70130		

[X] This report includes information for my spouse and dependent children
[ ] Information for my spouse and dependent children is submitted on separate forms

The following symbols may be used where applicable: (J) jointly owned by person reporting and spouse; (S) spouse; and (DC) dependent child.
See instructions, page 5

DO NOT WRITE IN THIS SPACE

Note: Please read the instructions accompanying this form. Sign this form on the reverse side. Attach additional sheets if needed; identify each attachment by showing your name and the section being continued. Complete all parts. (IF NONE, SO INDICATE). Please type or print clearly

NOTE: All income, all property, and all transactions involve community property owned jointly with my wife.

I. NON-INVESTMENT INCOME *See Page 6 of Instructions.*

	SOURCE (and, for Honoraria only, DATE RECEIVED)	TYPE	AMOUNT (Honoraria may be rounded to nearest $100)
None [ ]	Southern University, Baton Rouge - Sept, 1980	Honorarium	$100.00
	Southern University Law School - April 1980	Honorarium	$250.00
	Cooper Road Civic Club - May 1980	Honorarium	$500.00
	Orleans Parish School Board (S)	Salary	

II. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III)

Description of Assets including Trust Assets *See Page 7 of Instructions.*	II. Income (in excess of $100) *See Page 8 of Instructions.* Type of Income	II. Income Amount (Check appropriate block)	III. Value *See Page 9 of Instructions.* Valuation Method (Use Alphabetical Code)	III. Value Amount (Check appropriate block)
3 Apt. Bldg.- 1531 Feliciana	Rent	$2,501 to $5,000	F	$50,001 to $100,000
None [ ] New Orleans, Louisiana				
2 Apt. Bldg. - 2404-06 New Orleans St., New Orleans, Louisiana	Rent	$1,001 to $2,500	F	$50,001 to $100,000
New York Life	Div.	$100 or less	C	$1,001 to $5,000
United Federal Savings & Loan Association	Int.	$1,001 to $2,500	C	$100,001 to $250,000
Liberty Bank & Trust	Int.	$100 or less	C	$15,001 to $50,000
One-half share lot N. Robertson St., New Orleans, La.	None		F	$1,001 to $5,000
One-half share house Jourdan Ave., New Orleans, La.	None		F	$1,001 to $5,000

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Eastern District of Louisiana
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IV. **GIFTS** *See Page 10 of Instructions.*

A. Gifts of transportation, lodging, food, or entertainment.

SOURCE	DESCRIPTION
None ☐	
Law & Economics Center	Seminar Expenses

B. Other Gifts *See Page 11 of Instructions.*

		VALUE
None ☒		

V. **REIMBURSEMENTS** *See Page 11 of Instructions.*

SOURCE	DESCRIPTION
None ☐	
Law & Economics Center	Seminar Expenses

VI. **LIABILITIES** *See Page 11 of Instructions.*

DESCRIPTION *(include identity of Payee or Creditor)*	Amount in thousands of dollars: 10+ to 15	15+ to 50	50+ to 100	100+ to 250	250+
None ☒					

VII. **TRANSACTIONS** *See Page 11 & 12 of Instructions.*

DESCRIPTION	DATE	SALE	PURCHASE	EXCHANGE	Value in thousands of dollars: 1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+
None ☐										
One-half share lot N. Robertson St., N.O., La. - to St. John Divine Missionary Baptist Church - October 20, 1980		X				X				
One-half share house Jourdan Ave., N.O., La. to Mr. & Mrs. Herman Howard - June 18, 1980		X			X					

VIII. **POSITIONS** *See Page 12 of Instructions.*

POSITION	NAME OF ORGANIZATION
None ☐ Member - Board of Trustees	Loyola University, New Orleans, La.

IX. **AGREEMENTS** *See Page 13 of Instructions.*

DATES	PARTIES	TERMS
None ☒		

NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil & criminal sanctions (28 U.S.C.A. App. I, §304 & 18 U.S.C. §1001)

SIGNATURE I certify that all information given above is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory conditions permitting non-disclosure.

Robert F Collins DATE May 15, 1981

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Judicial Employees not associated with a specific court,
such as employees of the Administrative Office and
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Form 10
Rev 3/82

FINANCIAL DISCLOSURE REPORT

ANNUAL REPORT DUE BY MAY 15 FROM JUDICIAL OFFICERS AND CERTAIN JUDICIAL EMPLOYEES PER 28 USCA App. § 301 et seq.

NAME OF PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)	COURT OR ORGANIZATION	REPORT DUE DATE
COLLINS, ROBERT F.	United States District Court Eastern District of Louisiana	5/15/82
TITLE: JUDGE	IF YOU ASSUMED OFFICE DURING THE PAST YEAR, STATE THE DATE OF ENTRY ON DUTY	If Report is for Period other than Calendar Yr., Give Period Below:
HOME OR OFFICE ADDRESS: 500 Camp Street, Suite 465, New Orleans, Louisiana 70130		DO NOT WRITE IN THIS SPACE

[x] This report includes information pertaining to my spouse and dependent children, if any. The following symbols may be used where applicable: (J) jointly owned by person reporting and spouse; (S) spouse; and (DC) dependent child. See instructions, page 5.

Please read the instructions accompanying this form. Sign this form on the reverse side. Attach additional sheets if needed; identifying each attachment by showing your name and the section being continued. Complete all parts. Check the NONE box when you have no information to report. Please type or print clearly.

NOTE: All income, all property, and all transactions involve community property owned jointly with my wife.

I. NON-INVESTMENT INCOME *See Page 7 of instructions.*

SOURCE (and, for Honoraria only, DATE RECEIVED)	TYPE	AMOUNT (yours, not spouse's)
None ☐		
Southern University, Baton Rouge - Aug. 1981	Honorarium	$137.50
Orleans Parish School Board (S)	Salary	

II. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of Instructions*	II. Income (in excess of $100) *See Page 11 of Instructions* — Type of Income	II. Income — Income in thousands of dollars (check appropriate block): up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 50	50+ to 100	100 +	III. Value *See Page 11 of Instructions* — Valuation Method: Use Alphabetical Code	III. Value — Value in thousands of dollars (check appropriate block): 1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+
None ☐															
1 Apt. Bldg. - 1331 Felicians New Orleans, Louisiana	Rent				X				F			X			
2 Apt. Bldg. - 2403-05 New Orleans St., New Orleans, Louisiana	Rent		X						F			X			
New York Life	Div.	X							C	X					
United Federal Savings & Loan Association	Int.		X						C			X			
Liberty Bank & Trust	Int.	X							C		X				

RECEIVED
MAY 14 1982
U. S. DISTRICT COURT
Eastern District of Louisiana
DEPUTY CLERK

Sch. III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III) (Cont.)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of Instructions.*	II. Income (in excess of $100) *See Page 11 of Instructions.*								III. Value *See Page 11 of Instructions*						
	Type of Income	Income in thousands of dollars (check appropriate block)							Valuation Method - Use Appropriate Code	Value in thousands of dollars (check appropriate block)					
		up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 50	50+ to 100	100 +		1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+

FINANCIAL DISCLOSURE REPORT (Cont.)

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)

COLLINS, ROBERT F.

IV. GIFTS *None* ☐

A. Gifts of transportation, lodging, food, or entertainment. *See Page 13 of Instructions.*

SOURCE	DESCRIPTION

B. Other Gifts *See Page 14 of Instructions.*

		VALUE

V. REIMBURSEMENT *See Page 14 of Instructions.*

SOURCE	DESCRIPTION
None ☐	

VI. LIABILITIES *See Page 14 of Instructions.*

DESCRIPTION *(include identity of Payee or Creditor)*	Amount in thousands of dollars			
	10+ to 15	15+ to 50	100+ to 250	250+
None ☐				

VII. TRANSACTIONS *See Page 15 & 16 of Instructions.*

DESCRIPTION	DATE	SALE	PURCHASE	EXCHANGE	Value in thousands of dollars					
					1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+	250+
None ☐										

VIII. POSITIONS *See Page 16 of Instructions.*

	POSITION	NAME OF ORGANIZATION
None ☐	Member - Board of Trustees	Loyola University, New Orleans, La.

X. AGREEMENTS *See Page 17 of Instructions*

	DATES	PARTIES	TERMS
None ☒			

In accordance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not participate in any litigation during the period covered by this report in which I, my spouse, or dependent child or children had a financial interest in the outcome of such litigation.

I certify that all information given above is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

SIGNATURE _____ DATE May 14, 1982

NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions (28 U.S.C.A. App. 1, § 304 and 18 U.S.C. § 1001).

MAILING THIS FORM

Judicial Officers and Employees mail original and one copy of this form to:

Judge Edward A. Tamm
Judicial Ethics Committee
United States Courthouse
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

. . . Deliver one copy to the Clerk of the Court on which you sit or serve.
Judicial Employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center need not file a copy with any Clerk.

Form 10
Rev. 11/82

FINANCIAL DISCLOSURE REPORT

ANNUAL REPORT DUE BY MAY 15 FROM JUDICIAL OFFICERS AND CERTAIN JUDICIAL EMPLOYEES PER 28 USCA App. 1 §301 et seq.

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)	COURT OR ORGANIZATION	REPORT DUE DATE
COLLINS, ROBERT F.	United States District Court Eastern District of Louisiana	5/15/83
TITLE: JUDGE	IF YOU ASSUMED OFFICE DURING THE PAST YEAR, STATE THE DATE OF ENTRY ON DUTY	If Report is for Period other than Calendar Yr., Give Period Below:
HOME OR OFFICE ADDRESS: 500 Camp Street, Suite 465, New Orleans, Louisiana 70130		

IMPORTANT NOTE: *Please read the instructions accompanying this form. The report is designed for and should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name and the section being continued. Complete all parts. Check the NONE box when you have no information to report. Please type or print clearly. Sign this form on the reverse side.* NOTE: All income, all property, and all transactions involve community property owned jointly with my wife.

I. NON-INVESTMENT INCOME *See Page 7 of instructions.*

SOURCE (and, for Honoraria only, DATE RECEIVED)	TYPE	AMOUNT (yours, not spouse's)
None ☐		
Southern University, Baton Rouge, La. - Aug. 1982	Honorarium	$137.00
Orleans Parish School Board ($)	Salary	$2,000.00
Southern University, Baton Rouge, La. - Jan.-May 1982	Part-time teaching	

II. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of Instructions.*	II. Income (in excess of $100) *See Page 11 of Instructions.* Type of Income	II. Income (thousands of dollars) up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 50	50+ to 100	100+	III. Value *See Page 11 of Instructions.* Valuation Method Use Alphabetical Code	III. Value (thousands of dollars) 1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+
None ☐															
3 Apt. Bldg. - 1531 Feliciana St. New Orleans, Louisiana	Rent				X				F			X			
4 Apt. Bldg. - 2404-06 New Orleans Street, New Orleans, Louisiana	Rent		X						F			X			
New York Life	Div.	X							C	X					
UNITED Federal Savings & Loan Association	Int.		X						C			X			
J.C. Penney (IRA Acct.)	Int.	X							C	X					
Cooper Investors Life Insurance Company	Int.		X						C			X			

I. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III) (Cont.)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of Instructions.*	II. Income *(in excess of $100) See Page 11 of Instructions)*								III. Value *See Page 11 of Instructions*						
	Type of Income	Income in thousands of dollars (check appropriate block)							Valuation Method Use Alphabetical Code	Value in thousands of dollars (check appropriate block)					
		up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 100	50+ to 100	100 +		1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+

FINANCIAL DISCLOSURE REPORT (Cont.)

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)

COLLINS, ROBERT F.

IV. GIFTS *None* ☐

A. Gifts of transportation, lodging, food, or entertainment. *See Page 13 of Instructions.*

SOURCE	DESCRIPTION
Law and Economics Center Emory University, Atlanta, Georgia	Advanced Course for Federal Judges Statistics, Econometrics & Financial Data - Nov. 13-18, 1982 - Captiva Island, Fla. Total cost of services provided - $2,133.32

B. Other Gifts *See Page 14 of Instructions.*

		VALUE

V. REIMBURSEMENTS *See Page 14 of Instructions.*

SOURCE	DESCRIPTION
None ☒	

VI. LIABILITIES *See Page 14 of Instructions.*

DESCRIPTION *(include identity of Payee or Creditor)*	Amount in thousands of dollars				
	10+ to 15	15+ to 50	50+ to 100	100+ to 250	250+
None ☒					

VII. TRANSACTIONS

See Page 15 of Instructions.

DESCRIPTION *(include identity of Other Party where applicable)*	DATE	SALE	PURCHASE	EXCHANGE	Value of Transactions in thousands of dollars *(check appropriate block)*						Capital Gains in thousands of dollars *(check appropriate block)*							
					1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+	*None*	up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 50	50+ to 100	100+
None ☒																		

VIII. POSITIONS *See Page 16 of Instructions.*

POSITION	NAME OF ORGANIZATION
None ☐	
Member - Board of Trustees	Loyola University, New Orleans, Louisiana

IX. AGREEMENTS *See Page 17 of Instructions*

DATES	PARTIES	TERMS
None ☑		

In accordance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not participate in any litigation during the period covered by this report in which I, my spouse, or dependent child or children had a financial interest in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

SIGNATURE Robert F. Collins DATE July 6, 1983

NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions (28 U.S.C.A. App. 1, § 304 and 18 U.S.C. § 1001).

MAILING THIS FORM

Judicial Officers and Employees mail original and one copy of this form to:

Judge Edward A. Tamm
Judicial Ethics Committee
United States Courthouse
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

. . . Deliver one copy to the Clerk of the Court on which you sit or serve.
Judicial Employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center need not file a copy with any Clerk.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714

Section "C"

Magistrate Division 3

HEALTH SERVICES ACQUISITION CORP.,
Complainant

vs.

JOHN A. LILJEBERG, JR.,
Defendant

AFFIDAVIT

STATE OF TENNESSEE

COUNTY OF DAVIDSON

BEFORE ME, the undersigned notary public, personally came and appeared:

ELLIOTT WARNER JONES

who, after being by me first duly sworn, did depose and say:

That he only learned on August 17, 1983 that the Hon. Robert F. Collins, Judge of Section "C" of the United States District Court for the Eastern District of Louisiana, was at all pertinent and relevant times during the litigation of the matter of Health Services Acquisition Corp. vs. John A. Liljeberg, Jr., United States District Court for the Eastern District of Louisiana, Civil

Action No. 81-4714, Section "C" (3), a member of the Board of Trustees of Loyola University;

That he has read the deposition of John Eckholdt, Vice President of Business and Finance of Loyola University, taken on September 13, 1983 and has further learned that during all pertinent and relevant times during the litigation of the matter of Health Services Acquisition Corp. vs. John A. Liljeberg, Jr., United States District Court for the Eastern District of Louisiana, Civil Action No. 81-4714, Section "C" (3), pending before Judge Collins, negotiations were ongoing between Loyola University and John A. Liljeberg, Jr., a party to the above-stated matter for the purchase of Loyola land for the stated purpose of building St. Jude Hospital.

That Health Services Acquisition Corp. had purchased, prior to the above-stated action, through Axel Realty, Inc., a Liljeberg corporation, other property for the construction of a hospital facility to be known as St. Jude Hospital of Kenner, Louisiana, Inc.

That he has learned from review of the deposition of John Eckholdt and review of the minutes of the Board of Trustees that, at relevant times while litigation between Health Services Acquisition Corp. and Liljeberg was ongoing, progress of the litigation was reported to the Loyola Board of Trustees and that the minutes were distributed to all board members.

That he has learned from review of the deposition of John Eckholdt that pursuant to negotiations ongoing during the litigation above-referenced, Liljeberg was solely responsible, at his own expense and cost, for obtaining from the City of Kenner the rezoning of the Loyola land surrounding that to be purchased by Liljeberg.

That the effect of the rezoning was a substantial increase in the value of the land presently held by Loyola,

as contemplated and reported to the Loyola Board of Trustees at various times and during the litigation above-referenced.

That construction of a hospital on the 81-acre site and other structures affiliated with the hospital complex will have direct bearing on the value of the remaining 115-acre tract, as evidenced by Loyola's present negotiation for the sale of its land surrounding the tract sold to St. Jude for use for medically related purposes.

That accordingly the financial interests of Loyola University have been and will be affected as a result of the judgment in the above-referenced matter, which judgment was rendered by Judge Collins when a member of the Board of Trustees of Loyola University.

/s/ Elliott Warner Jones
ELLIOTT WARNER JONES

SWORN TO AND SUBSCRIBED BEFORE ME this 27th day of September, 1983.

/s/ Tammy H. Grove
Notary Public

My Commission Expires: 1-25-86

MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, MARCH 15, 1979, IN ROOM 206 OF THE LAW SCHOOL

[Excerpts from 7 page document]

Present:

Miss Gertrude M. Beauford
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Judge Robert F. Collins
Mrs. Celestine S. Cook
Mr. Harold S. Dey
Rev. Vincent J. Duminuco, S.J.
Mr. Frederick J. Gisevius, Jr.
Rev. John F. Keller, S.J.
Miss Margaret E. Lauer
Rev. Roland J. Lesseps, S.J.
Rev. A. Ransom Marlow, S.J.
Rev. Daniel W. Partridge, S.J.
Rev. Robert J. Ratchford, S.J.
Rev. Hilton L. Rivet, S.J.
Mr. Moise S. Steeg, Jr.

Absent:

Rev. Frank A. Benedetto, S.J.
Mr. G. Frank Purvis, Jr.
Rev. Robert F. Weiss, S.J.
Rev. Victor R. Yanitelli, S.J.

Present by invitation for entire meeting:

Mr. Charles I. Denechaud, Jr.
Mr. Thomas A. Rayer

Present by invitation for a portion of the meeting:

Mr. John L. Eckholdt
Dr. Robert A. Preston
Mr. Charles E. Young

The opening of the meeting was delayed until 1:10 p.m. because the Executive Committee needed time to complete its deliberations on the renovations proposed for Monroe Hall. After Father Clancy had led the prayer the minutes of the previous meeting were unanimously accepted as distributed.

• • • •

KENNER PROPERTY UPDATE

Mr. Eckholdt continued his report by giving a very thorough accounting of what has been going on between Loyola and the Kenner City Council in reference to Loyola's Kenner property. He explained the background of the move within the Council to expropriate certain parcels of that property and of the close vote that resulted in the deferral of such expropriation, and how it eventuated that the motion to expropriate land for a playground was withdrawn and the motion to expropriate land for a fire station was deferred.

To counteract the unfavorable publicity Loyola's dealings with the Council of the City of Kenner have been receiving, Mr. Young, who had been so asked by Father Carter, had these recommendations. Loyola should have a carefully prepared statement for presentation whenever it meets with Kenner officials. Mr. Young himself, or Loyola's Director of Public Relations, or both, should be present at all meetings in order that they may bring a balanced view to the public. Loyola alumni who reside in Kenner should receive a statement containing the University's view of what was happening and the objectives it has been endeavoring to achieve. Mr. Gisevius concurred with these recommendations and after indicating some of the politics that he believed were playing a background role, he stated with confidence that Loyola has now earned and does have the respect of the City of Kenner.

Mr. Steeg continued the discussion about the Kenner tract with a commendation for Mr. Eckholdt and Mr. Gisevius on the score of the work so well done by them and with a reminder that the Board of Trustees has the responsibility for the ultimate decisions concerning the use of University land. He then requested Mr. Young and Mr. Eckholdt to prepare a statement that would contain a summary of the good faith efforts made to meet the demands of the City of Kenner and an explanation of what the University is endeavoring to achieve. He concluded his remarks with the request that the following be recorded in the minutes: "we are aware of what the Real Estate Committee is doing and that the Committee understands that it is making recommendations to us, so it cannot be said that this Board has shirked its legal authority and legal responsibility in the management of the assets of the University." The Kenner tract discussion ended with a further urging by Miss Beauford that the Loyola side of the story be given to the Loyola alumni and students who reside in Kenner.

• • • •

REPORT OF THE STUDENT AFFAIRS COMMITTEE

Judge Collins stated that there was no report forthcoming from the Student Affairs Committee. He did note, however, that there have been some discussion concerning an amendment or amendments to the Student Government constitution and results will be reported at a later date.

• • • •

REPORT OF THE CHAIRMAN

Mr. Steeg reported that he was appointing members to the Presidential Evaluation Committee and members to the Board of Trustees Evaluation Committee. By way of a correcting Memo to the Board of Trustees, dated March 19, 1979, the former came to be: Mr. Dey, Judge Collins,

Miss Lauer, Father Yanitelli, Father Weiss and Father Duminuco; the latter: Mr. Purvis, Mrs. Cook, Miss Beauford, Mr. Gisevius, Fathers Marlow, Rivet and Partridge.

There being no new business, the meeting adjourned at approximately 5:00 p.m.

/s/ James C. Carter, S.J.
President

/s/ Frances H. Clancy, S.J.
Secretary

May 17, 1979

MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, NOVEMBER 29, 1979, IN ROOM 206 OF THE LAW SCHOOL

[Excerpts from 9 page document]

Present:

Miss Gertrude M. Beauford
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Mrs. Celestine S. Cook
Mr. Harold S. Dey
Rev. Vincent J. Duminuco, S.J.
Rev. John F. Keller, S.J.
Miss Margaret E. Lauer
Rev. Roland J. Lesseps, S.J.
Rev. Albert C. Louapre, S.J.
Rev. A. Ransom Marlow, S.J.
Mr. G. Frank Purvis, Jr.
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rowntree, S.J.
Rev. Robert F. Weiss, S.J.

Absent:

Judge Robert F. Collins
Mr. Frederick J. Gisevius, Jr.
Rev. Daniel W. Partridge, S.J.
Mr. Moise S. Steeg, Jr.
Rev. Victor R. Yanitelli, S.J.

Present by invitation for entire meeting:

Mr. Charles I. Denechaud, Jr.
Mr. Thomas A. Rayer
Mr. David M. Thompson

Present by invitation for a portion of the meeting:

Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Rev. Clement J. McNaspy, S.J.
Dr. Robert A. Preston
Mr. Charles E. Young

The regular meeting of the Board of Trustees was called to order at 1:07 p.m., with the opening prayer being led by Father Louapre.

THE MINUTES OF THE SEPTEMBER 28, 1979 MEETING WERE ACCEPTED UNANIMOUSLY ON MOTION OF FATHER WEISS, SECONDED BY MR. DEY, WITH THE FOLLOWING CORRECTIONS:

Page 2, Paragraph 6, line 5, to read ". . . would be designated for use entirely with the Plant Fund. . ." and Page 4, Paragraph 2, line 8 to read ". . . members would be raised to 24 the first year, then 28 and 32 in . . ."

• • • •

REAL ESTATE COMMITTEE REPORT

As Mr. Gisevius was detained in court, Mr. Eckholdt presented the Real Estate Committee Report.

Since the Board Real Estate Committee has not met pending a review of the President's Council Real Estate Committee, no action was required regarding the real estate negotiating policy. As an update regarding Loyola's real estate holdings, Mr. Eckholdt pointed out that negotiations are underway with the City of Kenner for approximately eight acres of land for an additional playground site, which has been appraised at $400,000. The City of Kenner does not have this amount in their budget and wishes to negotiate with Loyola regarding a multi-year payment arrangement over a two or three year period or a mutually satisfactorily quid pro quo agree-

ment. The question of egress and ingress would arise with this land, as the City of Kenner would like a street dedication for access and the University prefers a right of servitude arrangement.

Although there will not be a great deal of activity regarding zoning changes until after the December 8, 1979 elections, Fr. Carter and Mr. Eckholdt have met with a group of developers interested in acquiring a portion of Loyola's property for a hospital facility, to be called the St. Jude Medical Center (see attached Agenda Item C-3). This land is presently zoned C-2 commercial. The Board had previously decided not to sell any land zoned C-2 commercial. Therefore, zoning negotiations are underway with the City of Kenner, since a hospital does not require a C-2 commercial zoning, to attempt to have the commercial zoning moved in a north-south direction, rather than in its present east-west direction.

• • • •

There being no new business, the meeting was adjourned unanimously.

/s/ James C. Carter, S.J.
President

/s/ Thomas H. Clancy, S.J.
Secretary

January 24, 1980

MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, JANUARY 24, 1980, IN ROOM 206 OF THE LAW SCHOOL

[Excerpts from 10 page document]

Present:

Miss Gertrude M. Beauford
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Judge Robert F. Collins
Mrs. Celestine Shannon Cook
Mr. Harold S. Dey
Rev. Vincent J. Duminuco, S.J.
Mr. Frederick J. Gisevius, Jr.
Rev. John F. Keller, S.J.
Miss Margaret E. Lauer
Rev. Roland J. Lesseps, S.J.
Rev. A. Ransom Marlow, S.J.
Rev. Daniel W. Partridge, S.J.
Mr. G. Frank Purvis, Jr.
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rowntree, S.J.
Mr. Moise S. Steeg, Jr.
Rev. Robert F. Weiss, S.J.

Absent:

Rev. Albert J. Louapre, S.J.
Rev. Victor R. Yanitelli, S.J.

Present by invitation for entire meeting:

Mr. Charles I. Denechaud, Jr.
Mr. Thomas A. Rayer

Present by invitation for a portion of the meeting:

Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Dr. Robert A. Preston
Mr. Charles E. Young

The regular meeting of the Board of Trustees was called to order at 1:10 p.m., with the opening prayer being led by Father Rivet.

THE MINUTES OF THE NOVEMBER 29, 1979 MEETING WERE ACCEPTED UNANIMOUSLY ON MOTION OF MR. PURVIS, SECONDED BY FATHER DUMINUCO.

• • • •

REAL ESTATE COMMITTEE REPORT

Mr. Gisevius, Chairman of the Real Estate Committee, presented the committee report. The act of sale for one acre of land to the City of Kenner for a fire station and/or playground site in the amount of $50,600 has been executed. The sale also provided the City of Kenner with access to the above-mentioned land.

A meeting was held which included members of both the Board and President's Council Real Estate Committees on January 7, 1980. At that time, the committee considered an offer from St. Jude Properties Incorporated to purchase approximately seventy-five acres of Loyola's Kenner property for the sum of $23,000 per acre. One fifty acre tract was to be purchased as soon as possible with a two year option to be granted for the additional twenty-five acres. St. Jude Properties, if able to purchase the seventy-five acres, wants to establish a hospital on the site, which is between 35th and 40th Streets in Kenner. This site actually encompasses part of land zoned C-2 commercial. St. Jude Properties would work with the City of Kenner to turn the entire commercial area lengthwise from its present position to one towards Lake Pontchartrain.

This offer contained many contingencies, however; one of which was that St. Jude Properties has not received a certificate of need from the State health systems agency. Such certification is necessary for Medicare or

Medicaid monies to be available to the hospital. Another contingency would be for Loyola to donate land from W. Esplanade towards 40th Street which the hospital would improve. Loyola was also asked to furnish interim financing for the purchase price at approximately 8% interest during the development period until permanent financing was secured.

The Committee felt that Loyola was not seriously interested in this offer at this time and asked that Mr. Eckholdt so advice St. Jude Properties. On January 15, 1980, a letter was sent to Mr. Liljeberg, who heads the group, to the effect that the principal aspects of the offer were not acceptable to Loyola, with the $23,000 per acre being substantially below the amount Loyola would be willing to accept. The letter further stated the Committee recommendation that Loyola was desirous of continuing negotiations with St. Jude Properties but, that until a certificate of need were forthcoming, Loyola would more than likely not be interested in the project. Mr. Liljeberg was also advised that negotiations should continue between St. Jude Properties and Loyola with the presence and assistance of Loyola's attorney, Mr. Denechaud. The $50,600 selling price of the one acre to the City of Kenner would perhaps give Loyola a basis as to land value in judging future offers.

Another offer from St. Jude Properties was made to Mr. Denechaud on January 24, 1980, which would raise the purchase price to $30,000 per acre for the seventy-five acres for a total purchase price of $2,250,000 in cash to the University with no financing necessary and no commitments of any kind except the dedication of 110 feet for roadway purposes, with the improvement costs paid totally by the Liljeberg group. If the offer were accepted, St. Jude Properties would want sixty days to secure financing to finalize the sale. St. Jude Properties does not intend to go to the area health systems agency

for the certificate of need prior to construction, which means that no federal funding of any kind would be available either during construction or for any Medicare or Medicaid programs until the certificate is granted.

Mr. Steeg informed the Board that he was approached by the St. Jude Properties attorney requesting legal consultations with his clients for the purpose of engaging Mr. Steeg's services in preparing a prospectus and a public offering to raise funds for the project, without Mr. Steeg being aware that the land in question was Loyola's. Once Mr. Steeg was aware of the land in question, he consulted with Mr. Denechaud and determined that there was a conflict of interest on his part and withdrew his services from the Liljeberg group. FATHER CLANCY MOVED, SECONDED BY FATHER MARLOW, AND CARRIED UNANIMOUSLY, THAT THE BOARD REFER THE ST. JUDE PROPERTIES INCORPORATED OFFER TO THE BOARD REAL ESTATE COMMITTEE FOR FURTHER STUDY AND DISCUSSION AND THAT MR. DENECHAUD SO INFORM THE ST. JUDE PROPERTIES INCORPORATED.

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STUDENT AFFAIRS COMMITTEE REPORT

The Student Affairs Committee met on December 19, 1979 to discuss the role of the Board of Trustees and the University administration with respect to the approval of the Student Government Association (Agenda Item G-1). The Committee recommended that the Board formally approve the preamble of the constitution and those articles dealing with the purpose and powers of the organization. All other articles of the Constitution should be reviewed and approved by the Vice President for Student Affairs. If the Vice President believes a problem exists that he cannot resolve through discussion with the Student Government Association directly, the matter should

be brought to the Board through the Student Affairs Committee for final resolution. JUDGE COLLINS MOVED THAT THE BOARD APPROVE THE RECOMMENDATION OF THE STUDENT AFFAIRS COMMITTEE. THE MOTION CARRIED UNANIMOUSLY.

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There being no further business, the meeting was adjourned on motion of Father Clancy at 5:20 p.m.

/s/ James C. Carter, S.J.
President

/s/ T. H. Clancy, S.J.
Secretary

March 6, 1980

THE MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON FRIDAY, SEPTEMBER 25, 1981, IN THE SENIOR COMMONS, DANNA CENTER

[Excerpts from 11 page document]

Present:

Rev. Michael Alchediak, S.J.
Miss Gertrude M. Beauford
Mr. John F. Bricker
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Judge Robert F. Collins
Mrs. Celestine Shannon Cook
Mr. Harold S. Dey
Mr. Francis C. Doyle
Rev. Vincent J. Duminuco, S.J.
Rev. Gerald M. Fagin, S.J.
Rev. Daniel L. Flaherty, S.J.
Mr. Frederick J. Gisevius, Jr.
Mr. Roy F. Guste
Rev. John F. Keller, S.J.
Bro. James M. Kenny, S.J.
Mr. John P. Laborde
Rev. Roland J. Lesseps, S.J.
Rev. Albert C. Louapre, S.J.
Rev. A. Ransom Marlow, S.J.
Mrs. Martin O. Miller
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rowntree, S.J.
Mr. Moise S. Steeg, Jr.

Absent:

Mr. Carl F. Bailey
Rev. William McInnes, S.J.
Mr. G. Frank Purvis, Jr.
Mr. James E. Smith
Rev. Robert F. Weiss, S.J.

Present by invitation for entire meeting:

Mr. Charles I. Denechaud, Jr.
Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Dr. Robert A. Preston
Mr. Thomas A. Rayer
Mr. Charles E. Young

Present by invitation for a portion of the meeting:

Mr. Ivan A. Ransopher

The regular meeting of the Board of Trustees was called to order at 1:00 p.m., with the opening prayer being led by Father Fagin.

Mr. Doyle thanked Father Rivet for the new gavel and gavel rest which Father Rivet made for the Board of Trustees.

THE MINUTES OF THE MAY 14, 1981 MEETING WERE ACCEPTED UNANIMOUSLY ON MOTION OF FATHER CLANCY, SECONDED BY FATHER DUMINUCO.

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REAL ESTATE COMMITTEE REPORT

Since there was no specific action requested of the Real Estate Committee of the Board, Mr. Gisevius reported that the Real Estate Committee of the Board and the Real Estate Committee of the President's Council met jointly on September 11, 1981. Recent developments concerning the Committees were discussed, with Mr. Eckholdt providing an update on real estate matters.

Mr. Gisevius asked that Mr. Eckholdt apprise the Board regarding recent real estate developments (Agenda Item E-1). The University has been approached by a group representing the 1984 World's Fair asking if Loyola would be interested in leasing the Monroe Tract

in Kenner for a parking area for the fair, with persons attending the fair being bused into the fair area. No decisions have been made at this time. A new hospital has been approved for the Kenner area; however, the group which received approval was not the Hospital Corporation of America, which has been negotiating with Loyola for a possible hospital site on the University's Kenner land. The principals in the oil lease agreement with Loyola are continuing to negotiate with the City of Kenner regarding oil drilling permits, which have not been granted up to this time.

The development proposals regarding the University's real estate described in Agenda Item E-2 do not require action at this time; however, the first proposal on the rezoning of the 76.0 acre tract and sale of approximately 10 acres of the tract to the City of Kenner for use in conjunction with a proposed marina may require action prior to the November Board Meeting.

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THERE BEING NO FURTHER BUSINESS, THE MEETING WAS ADJOURNED UNANIMOUSLY.

/s/ James C. Carter, S.J.
President

/s/ Thomas H. Clancy, S.J.
Secretary

September 25, 1981

THE MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, NOVEMBER 12, 1981, IN THE SENIOR COMMONS, DANNA CENTER

[Excerpts from 10 page document]

Present:

Mr. Carl F. Bailey
Miss Gertrude M. Beauford
Mr. John F. Bricker
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Judge Robert F. Collins
Mrs. Celestine Shannon Cook
Mr. Harold S. Dey
Mr. Francis C. Doyle
Rev. Vincent J. Duminuco, S.J.
Rev. Gerald M. Fagin, S.J.
Rev. Daniel L. Flaherty, S.J.
Mr. Frederick J. Gisevius, Jr.
Rev. John F. Keller, S.J.
Bro. James M. Kenny, S.J.
Mr. John P. Laborde
Rev. Roland J. Lesseps, S.J.
Rev. Albert C. Louapre, S.J.
Rev. William McInnes, S.J.
Rev. A. Ransom Marlow, S.J.
Mrs. Martin O. Miller
Mr. G. Frank Purvis, Jr.
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rountree, S.J.
Mr. James E. Smith
Mr. Moise S. Steeg, Jr.
Rev. Robert F. Weiss, S.J.

Absent:

Rev. Michael Alchediak, S.J.
Mr. Roy F. Guste

Present by invitation for entire meeting:

Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Dr. Robert A. Preston
Mr. Thomas A. Rayer
Mr. Charles E. Young

Present by invitation for a portion of the meeting:

Mr. David M. Thompson
Ms. Mary H. Pendel

The regular meeting of the Board of Trustees was called to order at 1:00 p.m., with the opening prayer, which was in memory of Mr. Edward Mitchell, Loyola's tax attorney, who passed away on October 14, 1981, being led by Father Marlow.

THE MINUTES OF THE SEPTEMBER 25, 1981 MEETING WERE ACCEPTED UNANIMOUSLY AS CORRECTED UNDER THE AUDIT COMMITTEE REPORT ON PAGE FOUR AND AS CORRECTED IN THE LISTING OF THOSE PRESENT AND ABSENT ON PAGE ONE ON MOTION OF FATHER DUMINUCO, SECONDED BY FATHER MARLOW.

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REAL ESTATE COMMITTEE REPORT

Mr. Gisevius, Chairman of the Committee, reported that the Real Estate Committees of the President's Council and the Board met on October 23, 1981 and considered two items.

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The second item considered by the Committee was the possibility of preliminary discussions with developers of St. Jude Hospital regarding the possible purchase of acreage not to exceed the amount of 75 acres between 35th and 40th Streets. Mr. Eckholdt stated that the consultants recommended by the Real Estate Committees, Gregory C. Rigamer and Associates, have advised that a hospital in the vicinity of Loyola's land could be a significant investment factor, if the development of the hospital and surrounding acreage is kept under control.

The Real Estate Committee of the Board recommended that the Board approve the following resolutions as stated in Agenda Item D-2:

THAT THE VICE PRESIDENT FOR BUSINESS AND FINANCE BE AUTHORIZED TO CONTINUE NEGOTIATIONS WITH THE DEVELOPERS OF THE ST. JUDE HOSPITAL, THE PURPOSE OF WHICH IS TO SELL AN AMOUNT OF ACREAGE NOT TO EXCEED 75 ACRES BETWEEN 35th STREET AND 40th STREET (VINTAGE DRIVE) ON THE MONROE TRACT, AND TO HAVE THE PROPERTY BETWEEN 35th STREET AND 40th STREET REZONED IN A MORE FAVORABLE MANNER TO THE UNIVERSITY; HOWEVER, BEFORE FINAL RATIFICATION OF THE TRANSACTION, THE MATTER WILL BE FIRST RETURNED TO THE EXECUTIVE COMMITTEE FOR APPROVAL.

FATHER CARTER MOVED, SECONDED BY MR. GISEVIUS, AND CARRIED UNANIMOUSLY, THAT THE BOARD APPROVE THE TWO RESOLUTIONS AS STATED ABOVE.

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THERE BEING NO FURTHER BUSINESS, THE MEETING WAS ADJOURNED UNANIMOUSLY.

/s/ James C. Carter, S.J.
President

/s/ Thomas H. Clancy, S.J.
Secretary

November 12, 1981

THE MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, JANUARY 28, 1982, IN THE SENIOR COMMONS, DANNA CENTER

[Excerpts from 10 page document]

Present:

Rev. Michael Alchediak, S.J.
Mr. Carl F. Bailey
Miss Gertrude H. Beauford
Mr. John F. Bricker
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Mr. Harold S. Dey
Mr. Francis C. Doyle
Rev. Vincent J. Duminuco, S.J.
Rev. Gerald M. Fagin, S.J.
Rev. Daniel L. Flaherty, S.J.
Mr. Frederick J. Gisevius, Jr.
Mr. Roy F. Guste
Rev. John F. Keller, S.J.
Bro. James M. Kenny, S.J.
Mr. John P. Laborde
Rev. Albert C. Louapre, S.J.
Rev. William McInnes, S.J.
Rev. A. Ransom Marlow, S.J.
Mr. G. Frank Purvis, Jr.
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rowntree, S.J.
Mr. James E. Smith
Rev. Robert F. Weiss, S.J.

Absent:

Judge Robert F. Collins
Mrs. Celestine Shannon Cook
Rev. Roland J. Lesseps, S.J.
Mrs. Martin O. Miller
Mr. Moise S. Steeg, Jr.

Present by invitation for entire meeting:

Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Dr. Robert A. Preston
Mr. Thomas A. Rayer
Mr. Charles E. Young

Present by invitation for a portion of the meeting:

Dr. Rebecca U. Brechtel
Dr. E. P. Seybold, Jr.

The regular meeting of the Board of Trustees was called to order at 1:05 p.m., with the opening prayer being led by Father Alchediak.

THE MINUTES OF THE NOVEMBER 12, 1981 MEETING WERE ACCEPTED UNANIMOUSLY ON MOTION OF MR. DEY, SECONDED BY MISS BEAUFORD.

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REAL ESTATE COMMITTEE REPORT

Mr. Gisevius, Chairman of the Committee, reported that the Board and President's Council on Real Estate Committees met on January 22, 1982 and considered a plan by Delgado College to create a Jefferson Parish campus, involving the possible purchase of some of Loyola's Kenner land, as well as ongoing negotiations with the De Bartolo Corporation and the St. Jude Hospital Corporation.

Regarding the negotiations with the St. Jude Hospital Corporation, Mr. Eckholdt reported that the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation. If negotiations are brought to a satisfactory conclusion, there is a great likelihood that there will be a major hospital built on the University's property. Regarding negotiations with the De Bartolo Corporation, certain portions of the proposal

to lease some one hundred acres of Loyola's Kenner property for a regional shopping center still needed to be resolved. Two aspects under discussion is the low initial return on the value of the lease to the University and the number of years required before the University would receive a return on the gross amount of the lease, which would not allow the University to take advantage of any change in the consumer price index. Mr. Eckholdt met with De Bartolo representatives on January 29, 1982, at which time the De Bartolo representatives agreed to meet with St. Jude representatives to ascertain if both the hospital and the shopping center could be built on the Monroe Tract.

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If possible, these negotiations will not be concluded until the negotiations are completed with the St. Jude Hospital Corporation and the De Bartolo Corporation.

MR. GISEVIUS MOVED, SECONDED BY MR. GUSTE, AND CARRIED UNANIMOUSLY, THAT THE BOARD APPROVE THE REAL ESTATE COMMITTEE RECOMMENDATIONS CONTAINED IN AGENDA ITEM D-2 THAT THE VICE PRESIDENT FOR BUSINESS AND FINANCE BE AUTHORIZED TO CONTINUE NEGOTIATIONS WITH THE JEFFERSON PARISH SCHOOL BOARD, THE PURPOSE OF WHICH IS TO SELL AN AMOUNT OF ACREAGE (NOT TO EXCEED 20 ACRES) IN THE MONROE TRACT OF THE JEFFERSON PARISH SCHOOL BOARD: BEFORE FINAL RATIFICATION, THE MATTER WILL BE RETURNED TO THE EXECUTIVE COMMITTEE FOR FINAL APPROVAL. Mr. Laborde requested that a platte map be included with all future real estate presentations.

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THERE BEING NO FURTHER BUSINESS, THE MEETING WAS ADJOURNED UNANIMOUSLY.

/s/ James C. Carter, S.J.
President

/s/ Thomas H. Clancy, S.J.
Secretary

January 28, 1982

THE MINUTES OF THE MEETING OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES HELD ON THURSDAY, MARCH 25, 1982, IN THE SENIOR COMMONS, DANNA CENTER

[Excerpts from page domument]

Present:

Mr. Carl F. Bailey
Miss Gertrude M. Beauford
Mr. John F. Bricker
Rev. James C. Carter, S.J.
Rev. Thomas H. Clancy, S.J.
Judge Robert F. Collins
Mrs. Celestine Shannon Cook
Mr. Harold S. Dey
Mr. Francis C. Doyle
Rev. Vincent J. Duminuco, S.J.
Rev. Gerald M. Fagin, S.J.
Rev. Daniel L. Flaherty, S.J.
Mr. Frederick J. Gisevius, Jr.
Mr. Roy F. Guste
Rev. John F. Keller, S.J.
Bro. James M. Kenny S.J.
Mr. John P. Laborde
Rev. Ronald J. Lesseps, S.J.
Rev. Albert C. Louapre, S.J.
Rev. A. Ransom Marlow, S.J.
Rev. William McInnes, S.J.
Mrs. Martin O. Miller
Mr. G. Frank Purvis, Jr.
Rev. Hilton L. Rivet, S.J.
Rev. Stephen C. Rowntree, S.J.
Mr. Moise S. Steeg, Jr.
Rev. Robert F. Weiss, S.J.

Absent:

Rev. Michael Alchediak, S.J.
Mr. James E. Smith

Present by invitation for entire meeting:

Mr. John L. Eckholdt
Mr. Vincent P. Knipfing
Dr. Robert A. Preston
Mr. Thomas A. Rayer
Mr. Charles E. Young

Present by invitation for a portion of the meeting:

Dr. Richard P. Wendt

The regular meeting of the Board of Trustees was called to order at 1:05 p.m., with the opening prayer being led by Father Fagin.

THE MINUTES OF THE JANUARY 28, 1982 MEETING WERE ACCEPTED UNANIMOUSLY ON MOTION OF FATHER FLAHERTY, SECONDED BY MR. BAILEY.

REPORT OF THE EXECUTIVE COMMITTEE

Mr. Doyle reported that the Executive Committee met on March 11, 1982 and prepared the Agenda for the March 25, 1982 Board Meeting. The Committee approved four proposals regarding the University's real estate holdings in Kenner, as outlined in the Executive Committee minutes distributed to Board Members:

Hospital Site—Monroe Tract: To sell to John A. Liljeberg, Jr. approximately 80 acres of land in the Monroe Tract for $2.00 per square foot, or $87,120 per acre. The total sale price is $7,054,000. At the Act of Sale, the University will receive a net price of $6,694,000, or $1.90 per square foot (a $360,000 sales commission will be paid). In addition to the $1.90 per square foot, the purchaser will cause to have developed, at no cost to Loyola, a major boulevard of 3,290 linear feet running in a northerly direction from West Esplanade; this boulevard is a continuation of Loyola Drive. Also, the

purchaser will have the University's remaining property from West Esplanade to Vintage Drive favorably rezoned. The rezoning will be satisfactory to Mr. Eckholdt.

De Bartolo Corporation—Monroe Tract: Lease to the De Bartolo Corporation a site of 80 to 100 acres at a value of $3.00 per square foot with a 12% return. Mr. Eckholdt is authorized to lower the return to 11% if in his judgment other considerations can be obtained. The lease is to contain supplemental rent provisions commencing no later than the 10th year of the base term, but preferably after the 5th year; this determination will be left to Mr. Eckholdt's best judgment. The calculation of supplemental rent will be satisfactory to Mr. Eckholdt and will probably be related to the Consumer Price Index, or an equivalent.

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REAL ESTATE COMMITTEE REPORT

Mr. Gisevius called Board attention to the Executive Committee Report, which details the four real estate proposals approved by the Executive Committee on March 11, 1982, and the additional correspondence sent to Board Members by Mr. Eckholdt on March 19, 1982 regarding the entering into of an agreement between the University and John A. Litjeberg, Jr., whereby the University agrees to sell 80 acres in the Monroe Tract to Mr. Liljeberg for a net amount of approximately $6,694,000 or $1.90 per square foot, and gave a brief presentation on these matters. The Liljeberg agreement was entered into prior to the Board Meeting because of the necessity of obtaining rezoning of Vintage Drive in a manner more favorable to Loyola. This rezoning would be obtained by the St. Jude Corporation, as outlined in the agreement, and will take place after the upcoming Kenner municipal elections. Mr. Eckholdt pointed out that if the real estate negotiations with the Liljeberg interests are brought to completion, Mr. Monroe's farsighted projection regarding the Monroe Tract will soon be realized.

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Regarding the Jefferson Parish School Board negotiations to purchase a site of approximately 15 to 20 acres of the Monroe Tract close to Vintage Drive for new school construction, Mr. Eckholdt reported that he met with School Board officials on March 25, 1982 to discuss the possibility of selling acreage close to the proposed De Bartolo lease site area and the St. Jude Hospital site, opposite to the area which will still be owned by Loyola if both the St. Jude and De Bartolo agreements are finalized. Further negotiation meetings with the School Board are scheduled.

Negotiations are continuing between the University and the De Bartolo Corporation to lease a site of 80 to 100 acres in the Monroe Tract at a value of $3.00 per square foot with a 12% return.

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THERE BEING NO FURTHER BUSINESS, THE MEETING WAS ADJOURNED UNANIMOUSLY.

/s/ James C. Carter, S.J.
President

/s/ Thomas H. Clancy, S.J.
Secretary

March 25, 1982

[MINUTES OF LOYOLA UNIVERSITY BOARD OF TRUSTEES—NOVEMBER 18, 1982]

I, the undersigned Vice President for Business and Finance of Loyola University, hereby certify that the attached is a true and correct extract of the Minutes of the meeting of the Board of Trustees of Loyola University held on the 18th day of November, 1982 which extract represents all of said Minutes pertaining or relative to transactions or agreements concerning the proposed sale of property in University City Subdivision to John A. Liljeberg, et als.

/s/ John L. Eckholdt
JOHN L. ECKHOLDT

REAL ESTATE COMMITTEE REPORT

Mr. Bricker, Chairman of the Real Estate Committee, reported that the Committee met on November 17, 1982, and discussed campus expansion possibilities, as well as the St. Jude Hospital matter. Regarding the latter, an agreement has been concluded with Mr. John A. Liljeberg, Jr., the developer of the St. Jude Hospital Complex. The third alternative approved at the September Board Meeting has been entered into by the University and Mr. Liljeberg. $100,000 has been paid by Mr. Liljeberg as an initial up-front payment, with $50,000 being paid for the first three months. The monthly payment for the six month extension would be $100,000 thereafter. All of these payments would be credited to the purchase price. The St. Jude Hospital Corporation has won its suit in the 5th United States Circuit Court of Appeals, with a rehearing denied by the 5th Circuit, which means that the U.S. Supreme Court will not hear the case, and the hospital financing is moving forward.

The University had been approached by Mr. Clayton J. Charbonnet as to whether the University would be interested in purchasing his home at 1817 Calhoun Street for the amount of $475,000. The property has since been sold to the Sisters of Mercy for a convent residence. There is a possibility that the Holy Name Rectory will be moved to the former Mercy Convent on La Salle Pace, and that the building currently housing the rectory, which is already owned by Loyola, will revert back to the University.

A residence in the 1900 block of Calhoun Street has been offered for purchase to the University. The home appraises at $125,000 and would need an additional $75,000 in renovation costs. The Real Estate Committee recommended that the University purchase this property for the amount of $125,000. DR. CERISE MOVED, SECONDED BY MR. GUSTE, AND CARRIED UNANIMOUSLY, THAT THE BOARD ACCEPT THE REAL

ESTATE COMMITTEE RECOMMENDATION TO PURCHASE THE CALHOUN STREET RESIDENCE IN THE 1900 BLOCK FOR ITS APPRAISED VALUE OF $125,000.

At this time, the St. Charles Christian Church Board of Stewards is not any longer interested in selling the church property. However, the parsonage next to the church is still for sale. Since the Board has already approved the purchase of both the church and parsonage, further negotiations will be necessary for the purchase of the parsonage alone.

MINUTES OF LOYOLA UNIVERSITY BOARD OF TRUSTEES—MARCH 24, 1983

I, the undersigned Vice President for Business and Finance of Loyola University, hereby certify that the attached is a true and correct extract of the Minutes of the meeting of the Board of Trustees of Loyola University held on the 24th day of March, 1983 which extract represents all of said Minutes pertaining or relative to transactions or agreements concerning the proposed sale of property in University City Subdivision to John A. Liljeberg, et als.

/s/ John L. Eckholdt
JOHN L. ECKHOLDT

REAL ESTATE COMMITTEE REPORT

Mr. Bricker, Chairman of the Real Estate Committee, reported that the Committee met on March 21, 1983 and received a report on the sale of the St. Jude Hospital property on March 15, 1983 for $6,800,000. Mr. Eckholdt presented a report on the impact which the St. Jude Hospital property sale will have on the University's remaining Kenner land holdings. It is estimated that the sale of the property, which resulted in the commercial rezoning of some of Loyola's Kenner land, would impact the University's holdings in Kenner to the extent that the market value of the University's investment portfolio would increase to between $10,000,000 and $12,000,000.

No action regarding the sale of the Jefferson Parish School Board site on the Monroe Tract was required by the Board. The sale is expected to be completed on June 1, 1983. The Committee also reviewed the remainder of the Kenner land holdings, and is currently formulating an updated policy for these holdings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714

Section "C"

HEALTH SERVICES ACQUISITION CORPORATION

versus

JOHN A. LILJEBERG, JR.

JUDGMENT

This matter was tried before the Court, sitting without a jury, on January 21 and January 22, 1982. Pursuant to the Opinion of this Court, dated March 12th, 1982, and in accordance with the provisions of Fed.R.Civ.P. 58:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of the defendant, John A. Liljeberg, Jr., and against plaintiff, Health Services Acquisition Corporation, dismissing the cause of action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Complaint for injunction filed by defendant, John A. Liljeberg, Jr., against plaintiff, Health Services Acquisition Corporation, and third-party defendant, Hospital Corporation of America, will be and hereby is DISMISSED.

Each party shall bear their own costs.

New Orleans, Louisiana, this the 12th day of March, 1982.

/s/ Robert F. Collins
United States District Judge

Date of entry Mar. 16, 1982

New Orleans, Louisiana
March 19, 1982

AGREEMENT TO PURCHASE OR SELL

1. The undersigned Purchaser offers and agrees to purchase, that certain portion or plot of land situated in the City of Kenner, Parish of Jefferson, State of Louisiana, being a part of the Loyola Tract, which according to a sketch dated December 8, 1981, is described as follows:

> The real estate which is the subject of this agreement is described briefly as 81 acres, plus or minus, of land, situated in the City of Kenner, Sections 2, 11, 14 and 85, Township 12 South, Range 9 East, Southeast District of Louisiana, which is situated in what is known as the Monroe Tract in University City Subdivision and which is more particularly described on the plan of survey which is annexed hereto and identified as Exhibit "A", which is a survey of Ralph P. Fontcuberta, Jr., containing the description "A portion of Loyola Tract, University City Subdivision, Jefferson Parish, Louisiana".

2. This offer is made for the price and sum of SEVEN MILLION FIFTY-FOUR THOUSAND SIX HUNDRED TWENTY-NINE AND NO/100 ($7,054,629.00) DOLLARS, which sum shall be paid in cash at Act of Sale.

3. At Act of Sale, Seller will pay Axel Realty, Inc. a real estate agent's commission in the total amount of $360,000 without regard or reference to the sales price. Seller acknowledges that Purchaser is a real estate broker. Should Purchaser default, both parties agree that no commissions are due or payable.

4. This offer is made subject to the following conditions:

a) Occupancy and possession shall be given to Purchaser at the time of the Act of Sale.

b) All special assessments including all recorded liens for paving, sewerage, utilities, street surfacing and other charges bearing against the property, as of this date, shall be paid by Vendor.

c) Real estate taxes, if any, shall be prorated to date of Act of Sale.

d) All proper and necessary certificates shall be paid by the Seller.

e) The cost of the survey and the certificate of determination of acreage shall be paid by Purchaser.

f) Act of Sale at expense of Purchaser to be passed before Purchaser's Notary, on or prior to September 30, 1982, said date to be designated by Purchaser.

g) This sale is conditioned upon the ability of the Purchaser to borrow upon this property as security the sum of $6,054,629 by a mortgage loan or loans at a rate of interest not to exceed 18% per annum, interest and principal payable in equal annual installments, over a period of ten (10) years.

h) The Seller shall deliver to Purchaser a merchantable title.

5. The Act of Sale shall contain the following provisions:

"Seller, its successors and assigns, shall not permit:

a) Any oil or other mineral well to be drilled.

b) Any mine produced material to be extracted.

c) Any oil or other mineral producing or mine extraction or pumping equipment or structures relating thereto, or

d) Any oil or other minerals to be carried, transported, or stored by trucks, tanks, pipelines or otherwise,

on or within one thousand feet of the property specified herein.

Any violation of this provision shall entitle Purchaser, its successors and assigns, the right to damages or injunctive relief, or both, at Purchaser's option. Seller shall, however, specifically retain and reserve unto itself, all oil, gas and other mineral rights to the said property and shall be entitled to extract same therefrom by directional subsurface operations at a distance in excess of one thousand feet from the subject property. This provision shall not be construed to be, nor constitute, an extension of the statute of limitations with regard to such mineral servitudes."

6. Coincident with the Act of Sale of this property, Seller will impose, by a notarial act, a servitude on all property which it owns within one thousand feet of the specified property and in favor of the specified property, recognizing and establishing the rights granted the specified property as set forth in Paragraph 5 immediately above.

7. Prior to the passage of the Act of Sale, the Purchaser shall attempt to have the City of Kenner change the zoning classification of certain land in accordance with the attached plan identified as Exhibit "B" which is made part of this agreement. Seller shall lend its cooperation and assist Purchaser in accomplishing this condition at no expense to Seller. The desired zoning change provided in this paragraph shall be at Purchaser's sole cost and expense.

Within one week after this offer has been accepted, Seller, at its sole expense, will submit, if necessary, to Purchaser a more detailed and surveyor certified plan of

rezoning substantially in accordance with Exhibit "B" above for such portion of Seller's remaining property in the Monroe Tract in University City, Kenner, Louisiana. Within seven days following the receipt thereof, Purchaser will submit Seller's plan for rezoning and Purchaser's Planned Unit Development (P.U.D.) simultaneously to the Department of Planning and Zoning of the City of Kenner for review and approval and Purchaser will use its best efforts to have both the zoning plan and the P.U.D. approved by the Kenner City Council simultaneously.

If, for any reason, the zoning change contemplated by this paragraph cannot be accomplished prior to the date fixed for the Act of Sale, this entire agreement shall become null and void and Seller shall return to Purchaser its deposit, and neither party shall have any further responsibility to the other.

8. Axel Realty, Inc. agrees to arrange, at no cost to Seller, for the paving, subsurface drainage, sewerage, curbing and lighting, of the extension of 3,290 linear feet of Loyola Drive to a right-of-way width not to exceed 110 feet within two streets, each being at a minimum width of thirty-two feet, which must conform to the planning and zoning requirements of the City of Kenner, provided, however, that Seller furnish the said right-of-way, which is located on the east side of and adjacent to the property which is the subject of this agreement, at no cost to Purchaser. It is mutually understood and agreed upon that if additional right-of-way is required, said right-of-way will be taken equally from that property which is adjacent to both sides of the contemplated 110′ right-of-way. Installation and completion of this street is to be completed on or before the opening of the contemplated hospital, but no later than 24 months from the date of Act of Sale Seller shall formally dedicate the right-of-way for the extension of Loyola Drive as aforedescribed or shall deed the area to Purchaser for such purpose at the

time the City of Kenner approves the zoning changes specified in Paragraph 7 above.

In the event that Purchaser has not completed or caused to be completed the entire 3,290 linear feet of paving and improvements on Loyola Drive within 24 months from the date of the Act of Sale, Puchaser shall then be required to immediately enter into a bonded contract with a paving contractor to Seller for the completion thereof or Purchaser shall be required to immediately deposit in escrow with a financial institution acceptable to Seller a sum to be determined by multiplying the number of linear feet of paving and improvements remaining to be completed by $500.00 per linear foot thereof, which sum shall be released to Purchaser upon entering into said paving contract.

The escrow agreement shall further provide that in the event that the total 3,290 linear feet of Loyola Drive extension is not fully completed within 30 months from the date of the Act of Sale the escrow agent shall be then authorized to terminate the escrow agreement and pay over to the Seller that portion of the escrow funds (as determined by the above linear foot unit price formula) necessary to fully complete the remaining unpaved portion of Loyola Drive, the balance of said escrowed funds, if any, to be refunded by the escrow agent to the Purchaser, together with any accrued interest thereon.

9. Upon the acceptance of this offer, both the Vendor and the Purchaser shall be bound by all of its terms and conditions and Purchaser becomes obligated to deposit with Seller immediately, a part of the purchase price, which deposit shall be in the form of a promissory note endorsed by John Liljeberg individually payable to Vendor in the amount of $70,546.00 and failure to do so shall constitute a breach of this contract so as to terminate this agreement. In this event, the Purchaser shall pay Seller liquidated damages equal to the amount of said deposit. The said deposit is to be non-interest bearing.

10. The promissory note will be irrevocable and unconditional and payable to Vendor on September 30, 1982, in the event the Purchaser does not comply for any reason other than failure of title, then Seller shall have the right to claim proceeds of the promissory note as liquidated damages.

11. In the event of a failure of title, Vendor will return the promissory note to Purchaser.

12. If the contract is extended automatically or by agreement of the parties, the promissory note will be submitted by Vendor to be renewed and extended through the scheduled closing date.

13. Act of Sale, at expense of Purchaser, shall be passed before Purchaser's Notary, on or prior to September 30, 1982, provided, however, that if bona fide curative work in connection with title is required by the attorney for Purchaser or by the attorney for his title insurer, the parties hereto agree now to and do hereby extend the time for passing of the Act of Sale additionally by 60 days.

14. The parties hereto take cognizance of the existence of certain litigation pending in the U.S. District Court for the Eastern District of Louisiana between Purchaser and third parties involving the obtaining by Purchaser of a Certificate of Need from the U.S. Department of Health and Human Services and/or the State of Louisiana for the construction of St. Jude Hospital of Kenner under Section 1122, and in that regard, it is hereby agreed that this sale shall not be in any way conditioned upon the success of Purchaser in that litigation or the obtaining of a final judgment favorable to Purchaser therein. Purchaser further agrees to fully indemnify and hold Seller harmless from any suits, causes of action, damages, including attorneys' fees, or other related costs which may be incurred by Seller as a result of becoming in anyway involved in

said dispute over the rights of ownership to the Section 1122 certificate.

15. In the event that this contract becomes null and void by its terms, the Purchaser shall have the right to demand the return of the deposit, which is the promissory note above referred to, from the holder thereof.

16. In the event the Seller breaches and fails to comply with this agreement after its acceptance, within the time specified, as automatically extended, the Purchaser shall have the right to demand the return of his deposit in full, plus a sum equal in amount to the deposit as liquidated damages, by stipulation, or the Purchaser may demand specific performance, at his option.

17. In the event the Purchaser fails to comply with this agreement within the time specified, the Seller shall have the right to declare the deposit, ipso facto, forfeited, without any formality whatsoever, or the Seller may demand specific performance, at his option.

18. Either party hereto who fails, for any reason whatsoever, to comply with the terms of this offer, if accepted, is obligated and agrees to pay all attorneys' fees and costs incurred by the other party in enforcing his legal rights.

19. It is recognized by both parties that the primary purpose that the Seller has agreed to in this sale is to have a hospital constructed on the property to be sold, and that John A. Liljeberg, Jr. represents that either he and/or St. Jude Hospital of Kenner, Louisiana is the owner of #1122 Certificate of Need which was issued on August 26, 1981. Therefore, if Purchaser, or its successors or assigns, has not executed a construction contract for the construction of at least a 200-bed hospital on the land within one year following the Act of Sale contemplated herein, Seller shall have the right to re-purchase the land for $6,694,-629.00 plus the actual cost expended by Purchaser for land-fill, roadway preparation, construction of the 3,290

linear foot Loyola Drive extension plus any interest on funds borrowed to finance said costs. This option may be exercised only during the thirty-day period immediately following the one-year period mentioned in this paragraph by so notifying Purchaser in writing by Registered or Certified mail, return receipt requested, at 2713 Piedmont Street, Kenner, Louisiana 70062. If so exercised, the Act of Sale will be at Seller's cost and shall be passed within sixty days from the receipt of said notice by Purchaser. Seller's right to re-purchase shall apply to all or any portion of the specified property; however, should Seller elect to re-purchase only a part of the property, it shall pay Purchaser for said part, an amount equal to $82,650 per acre plus all of the aforesaid costs including interest thereon expended by Purchaser, which relate to the specific portion re-purchased, and provided, further, that the portion of the property re-purchased shall consist of one contiguous parcel with one line being either the northerly or southerly line of the property and another line running across the entire width of the property measuring approximately 1,072 feet from east to west, with all four corners of said portion forming 90° angles.

20. Should the property be subject to any title restrictions which would interfere with or prevent the construction of a hospital, such restrictions are agreed by the parties to come within the term "bona fide curative work in connection with title" as contained in Paragraph 13 above.

21. The Purchaser shall have the right to assign this agreement to a corporation, partnership or other entity in which he owns or controls the voting stock without any consent of the Vendor, provided, however, that the undersigned offeror shall remain personally responsible for the fulfillment of this contract.

22. In addition to the 81 acres referenced in paragraph #1 above, purchaser shall have the option to purchase

from Seller two lots described as lot 42A and Lot 14 in Square 19. Lot 42A measures 65′ x 130 feet and Lot 14 measures 75′ x 130 feet, for the total price and sum of THIRTY-SIX THOUSAND FOUR HUNDRED AND NO/100 ($36,400.00) DOLLARS, which sum shall be payable in cash at Act of Sale. This price is in addition to the $7,054,629 mentioned in paragraph 2 above. This option may be exercised by Purchaser by sending Seller written notice at least 30 days prior to the Act of Sale and said optioned property shall be conveyed at the time of said Act.

23. Seller agrees to modify the title restrictions recorded in COB 885, folios 19 and 20 so as to delete therefrom the reference to "d) liquor stores".

This offer remains binding and irrevocable through March 19, 1982, at 5:00 o'clock P.M., C.S.T.

WITNESSES: AXEL Realty, INC.

/s/ [Illegible] /s/ By: John A. Liljeberg, Jr.
JOHN A. LILJEBERG, JR.
/s/ [Illegible] President

ACCEPTANCE

New Orleans, Louisiana
March 19, 1982

I/WE accept the above and foregoing in all of its terms and conditions.

WITNESSES: LOYOLA UNIVERSITY, NEW ORLEANS

/s/ [Illegible] /s/ [Illegible]
Vendor
/s/ [Illegible]

PLAINTIFF'S EXHIBIT A

[ORDINANCE TO AMEND ORDINANCE NO. 2427—MARCH 4, 1982]

On the motion of Councilman Baroni, seconded by Councilman Muniz, the following Ordinance was introduced:

SUMMARY NO. 1734 ORDINANCE NO. 3174

AN ORDINANCE TO AMEND ORDINANCE NO. 2427, THE COMPREHESIVE ZONING ORDINANCE OF THE CITY OF KENNER, BY AMENDING SECTIONS 3.02A(60), 11.02A(4) AND 12.02A(12) RELATIVE TO HOSPITALS.

WHEREAS, it is in the best interest of the health, safety and welfare of the citizens of the City of Kenner that any hospital built within the City of Kenner possess a "Certificate of Need" under Section 1122 of the Social Security Act.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL FOR THE CITY OF KENNER:

SECTION I: That Section 3.02A(60) of Ordinance No. 2427 which reads as follows:

> HOSPITAL. A building or group of buildings having room facilities for overnight patients, used for providing services for in-patient medical or surgical care of sick or injured humans and which may include related facilities such as central service facilities and staff offices, provided, however that such related facilities must be incidental and subordinate to the main use and must be an integral part of the hospital operation.

is hereby amended to read as follows:

HOSPITAL. A building or group of buldings having room facilities for overnight patients, used for providing services for in-patient medical or surgical care of sick or injured humans and which may include related facilities such as central service facilities and staff offices, provided, however, that such related facilities must be incidental and subordinate to the main use and must be an integral part of the hospital operation. Provided further that all hospitals must possess a "Certificate of Need" under Section 1122 of the Social Security Act.

SECTION II: That Section 11.02A(4) which reads as follows:

Health clinics, but not animal clinics, and hospitals.
is hereby amended to read as follows:

Health clinics, but not animal clinics, and hospitals, provided further that all hospitals must possess a "Certificate of Need" under Section 1122 of the Social Security Act.

SECTION III: That Section 12.02A(12) which reads as follows:

Hospital, convalescent and nursing homes.
is hereby amended to read as follows:

Hospital, convalescent and nursing homes, provided further that all hospitals must possess a "Certificate of Need" under Section 1122 of the Social Security Act.

SECTION IV: If any of the provisions of the Section or the application thereof to any person or circumstances are held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are declared to be severable.

This ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: 6

NAYS: 0

ABSENT: Councilman Hand

This ordinance was declared adopted on the 4th day of March, 1982.

/s/ Kathryn K. Fowler
KATHRYN FOWLER
Clerk of the Council

/s/ Raoul A. Galan, Jr.
RAOUL A. GALAN, JR.
Council President

SUBMITTED BY: City Attorney's Office

PLAINTIFF'S EXHIBIT B

[ORDINANCE TO AMEND ORDINANCE NO. 2427—AUGUST 19, 1982]

On motion of Councilman Hipp, seconded by Councilman Baroni, the following Ordinance was introduced:

SUMMARY NO. 1840 ORDINANCE NO. 3265

AN ORDINANCE AMENDING ORDINANCE NO. 2427 ADOPTED BY THE CITY OF KENNER ON DECEMBER 4, 1978, ENTITLED ZONING ORDINANCE OF THE *CITY OF KENNER*, LOUISIANA, MORE PARTICULARLY AMENDING AND REZONING A PORTION OF THE *LOYOLA TRACT (MONROE TRACT), UNIVERSITY CITY SUBDIVISION*, CITY OF KENNER, JEFFERSON PARISH, LOUISIANA, FROM R-1, SINGLE FAMILY, TO R-2, TWO FAMILY, R-3, MULTI-FAMILY, C-1, NEIGHBORHOOD COMMERCIAL, C-2 GENERAL COMMERCIAL, AND G-O, GENERAL OFFICE, IN ACCORDANCE WITH SURVEY OF R. P. FONTCUBERTA, JR., PROFESSIONAL LAND SURVEYOR, DATED MAY 21, 1982; DEDICATING A ONE HUNDRED TEN FEET (110 FT.) BY THREE THOUSAND TWO HUNDRED NINETY FEET (3,290 FT.) RIGHT-OF-WAY FOR THE EXTENSION OF LOYOLA DRIVE IN ACCORDANCE WITH SURVEY OF R. P. FONTCUBERTA, JR., PROFESSIONAL LAND SURVEYOR, DATED MAY 21, 1982, TO PUBLIC USE: AND, DIRECTING, AUTHORIZING AND EMPOWERING THE PLANNING DIRECTOR OF THE CITY OF KENNER TO ALTER AND AMEND THE OFFICIAL ZONING MAP OF THE CITY OF KENNER, TO REFLECT SAID AMENDMENT.

1) *WHEREAS*, the portion of the Loyola Tract (Monroe Tract), University City Subdivision, City of Kenner, Jefferson Parish, Louisiana, hereinafter specifically described, is designated on the Official Zoning Map of the City of Kenner as R-1, Single Family Zoning; and,

2) *WHEREAS*, Loyola University, New Orleans, Louisiana, is the owner of said propery and is desirous of obtaining a rezoning of said property to R-2, Two Family, R-3, Multi-Family, C-1, Neighborhood Commercial, C-2, General Commercial, and G-O, General Office, in accordance with survey of R. P. Fontcuberta, Jr., Professional Land Surveyor, dated May 21, 1982, a copy of which said survey is attached hereto and made a part hereof; and,

3) *WHEREAS*, Loyola University has expressed an intention to dedicate a 110 feet by 3290 feet right-of-way for the extension of Loyola Drive in accordance with the survey of R. P. Fontcuberta, Jr., Professional Land Surveyor, dated May 21, 1982, said right-of-way to be dedicated by separate act to dedication within thirty (30) days from the date of adoption of this ordinance; and,

4) *WHEREAS*, the Planning Director of the City of Kenner has caused a pub'ic hearing to be held, as prescribed by law, for the rezoning of said property; and,

5) *WHEREAS*, the said public hearing was held on the 5th day of Aug., 1982, to consider and hear all parties of interest with respect to the rezoning of said property from R-1, Single Family, to R-2, Two Family, R-3, Multifamily, C-1, Neighborhood Commercial, C-2, General Commercial, and, G-O, General Office, in accordance with the aforementioned survey; and,

6) *WHEREAS*, the report and recommendation resulting from said public hearing have been submitted to the City Council of the City of Kenner, all in accordance with law.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KENNER:

SECTION I: That the zoning classification of a portion of the Loyola Tract (Monroe Tract), University City Subdivision, City of Kenner, Jefferson Parish, Louisiana, be and the same hereby is, amended and changed from R-1, Single Family, to R-2, Two Family, R-3, Multi-Family, C-1, Neighborhood Commercial, C-2, General Commercial, and, G-O, General Office, in accordance with the survey of R. P. Fontcuberta, Jr., Professional Land Surveyor, dated May 21, 1982, a copy of which is annexed hereto and made a part hereof; and which property is more particularly described in accordance with said survey as follows:

R-2, TWO FAMILY

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence South 86 degrees, 06 minutes, 21 seconds, East, along the aforesaid northerly right-of-way, a distance of 130.00 feet to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 3,290.00 feet, to the point of beginning; thence continuing North 03 degrees, 53 minutes, 39 seconds, East, a distance of 890.00 feet, to a point on the Southerly right-of-way of the proposed Vintage Drive; thence South 86 degrees, 06 minutes, 21 seconds, East, along the aforesaid proposed right-of-way, a distance of 1127.04 feet to a point; thence South, 03 degrees, 53 minutes, 39 seconds, West, a distance of 890.00 feet, to a point; thence North, 86 degrees, 06 minutes, 21 seconds, West, a distance of 1127.04 feet, to the point of beginning and containing 23.03 acres.

R-3, MULTI-FAMILY

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence South, 86 degrees, 06 minutes, 21 seconds, East, along the aforesaid northerly right-of-way, a distance of 130.00 feet, to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 3,290.00 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 1127.04 feet, to the point of beginning; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 640.00 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 918.54 feet, to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 41.50 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 208.50 feet, to a point; thence South, 03 degrees, 53 minutes, 39 seconds, West, a distance of 1956.50 feet, to a point; thence North 86 degrees, 06 minutes, 21 seconds, West, a distance of 1072.04 feet, to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 1275.00 feet, to a point; thence North, 86 degrees, 06 minutes, 21 seconds, West, a distance of 55.00 feet, to the point of beginning and containing 48.14 acres.

C-1, NEIGHBORHOOD COMMERCIAL

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence South, 86 degrees, 06 minutes, 21 seconds, East along the aforesaid northerly right-of-way, a distance of 2384.08 feet, to a point; thence North 03 degrees, 53 minutes, 39 seconds, East, a distance of 4180.00 feet, to a point on the southerly

right-of-way of proposed Vintage Drive; thence North, 86 degrees, 06 minutes, 21 seconds, West, along the aforementioned right-of-way, a distance of 208.50 feet to the point of beginning; thence South, 03 degrees, 53 minutes, 39 seconds, West, a distance of 250.00 feet, to a point; thence North, 86 degrees, 06 minutes, 21 seconds, West, a distance of 918.54 feet, to a point; thence North 03 degrees, 53 minutes, 39 seconds, East, a distance of 250.00 feet, to a point on the southerly right-of-way of proposed Vintage Drive; thence South, 86 degrees, 06 minutes, 21 seconds, East, along aforesaid right-of-way a distance of 918.54 feet, to the point of beginning and containing 5.27 acres.

C-2, GENERAL COMMERCIAL

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence South 86 degrees, 06 minutes, 21 seconds, East along the aforesaid northerly right-of-way, a distance of 2384.08 feet, to a point; thence North 03 degrees, 53 minutes, 39 seconds, East, a distance of 450.00 feet, to the point of beginning; thence North, 86 degrees, 06 minutes, 21 seconds, West, a distance of 1072.04 feet; to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 600.00 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 1072.04 feet, to a point; thence South, 03 degrees, 53 minutes, 39 seconds, West, a distance of 600.00 feet, to the point of beginning and containing 14.77 acres.

G-O, GENERAL OFFICE

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th

Street); thence South, 86 degrees, 06 minutes, 21 seconds, East, along the aforesaid northerly right-of-way, a distance of 2384.08 feet, to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 1050.00 feet, to the point of beginning; thence North 86 degrees, 06 minutes, 21 seconds, West, a distance of 1072.04 feet, to a point; thence North, 03 degrees, 53 minutes, 39 seconds, East, a distance of 965.00 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 1072.04 feet, to a point; thence South, 03 degrees, 53 minutes, 39 seconds, West a distance of 965.00 feet, to the point of beginning and containing 23.75 acres.

SECTION II: That the rezoning approved in Section I herein above is specifically conditioned upon the dedication by Loyla University to public use by separate act of dedication within 30 days from the date that construction commences on St. Jude Hospital of a right-of-way for the extension of Loyola Drive measuring One Hundred Ten Feet (110 ft.) by Three Thousand Two Hundred Ninety Feet (3,290 ft.), in accordance with the survey of R. P. Fontcuberta, Jr., Professional Land Surveyor, dated May 21, 1982, a copy of which is annexed hereto and made a part hereof, and which said right-of-way is more particularly described in accordance with said survey as follows:

LOYOLA DRIVE EXTENSION

Commencing at the intersection of the easterly right-of-way of Loyola Drive West and the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence South 86 degrees, 06 minutes, 21 seconds, East along the aforesaid northerly right-of-way distance of 1202.04 feet to the point of beginning; thence North 03 degrees, 53 minutes, 39 seconds, East, a distance of 3290 feet, to a point; thence South, 86 degrees, 06 minutes, 21 seconds, East, a distance of 110 feet, to a point; thence South, 03 de-

grees, 53 minutes, 39 seconds, West, a distance of 3290 feet, to a point on the northerly right-of-way of West Esplanade Avenue (formerly 35th Street); thence North, 86 degrees, 06 minutes, 21 seconds, West, along the aforesaid northerly right-of-way, a distance of 110 feet, to the point of beginning, and containing 8.31 acres.

SECTION III. That the Planning Director of the City of Kenner be, and he hereby is, authorized, empowered and directed to make all necessary and appropriate changes and amendments to Ordinance No. 2427, of the City of Kenner, more particularly the Official Zoning Map of the City of Kenner, designating the zoning of the herein before described property as R-2, Two Family, R-3, Multi-Family, C-1, Neighborhood Commercial, C-2, General Commercial, and G-O, General Office, in accordance with the aforementioned survey of R. P. Fontcuberta, Jr., Professional Land Surveyor.

SECTION IV. A. That Loyola University shall dedicate Vintage Drive from its intersection with East Loyola Drive to its intersection with West Loyola Drive. B. That Loyola University shall dedicate Loyola Drive from West Esplanade to Vintage Drive. C. That the dedication will be by separate act and will be completed when funds are available for construction either by Jefferson Parish or by the developer. D. That 17 acres of property at today's current market value shall be available to the Jefferson Parish School Board for a school site, from the area previously designated as R-1. School Board site to front on Vintage Drive. E. That Loyola University shall also donate two acres of land from the R-2 area to the City of Kenner; and give the City of Kenner a five year option to purchase an additional six (6) acres at today's current market value. The two acres shall be donated prior to this rezoning taking effect. F. That Loyola University shall make a church site available to a religion of any denomination for a period of three (3) years at today's current

market value. G. That 50′ shall be required for the easterly setback requirement for all developments along the eastern boundary for the R-3 and G-O district and 75′ for the eastern boundary of the C-2 zoned district. All setbacks to be in accordance with that certain drawing prepared by Gregory Rigamer and attached hereto as Exhibit 3 of booklet entitled "Proposed Rezoning Loyola Properties, Zoning Case Z-1-82" dated August 5, 1982. H. That Loyola shall deed restrict the R-3 and 15 units per acre to be enforced by the City of Kenner (deed restriction in favor of Kenner). I. That this rezoning shall not become effective until construction contracts have been let and construction commenced on the St. Jude Hospital as proposed in PUD-4-82.

SECTION V. That all ordinances or parts of ordinances as may be in conflict with this ordinance are hereby expressly repealed and rescinded, but only insofar as they conflict with the provisions of this ordinances, and no further.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

BEST AVAILABLE COPY

LOYOLA DRIVE

"R-3"

"R-2"

"O-G"

P.U.D

"C-2"

"C-2"

LOYOLA DRIVE

4292

1956.70'

1072.04'

N86°06'21"W

2384.08'

WEST

EAST

WEST ESPLANADE AVENUE (35th STREET)

CITY OF KENNER
JEFFERSON PARISH, LA.

CERTIFIED CORRECT TO

John A. Lilliebert, Jr.

B M CORPORATION

A Professional Land Surveying Company

534 WILLIAMS BLVD
KENNER, LA 70062

CERTIFIED CORRECT

R. J. Destefano Jr. PLS

REGISTERED PROFESSIONAL LAND SURVEYOR

MAY 21 1982

1" = 400'

B-005

70

YEAS: 7

NAYS: 0

ABSENT: 0

ABSTAINING: 0

This ordinance was declared adopted on this the 19th day of August, 1982.

/s/ Gwen Boynton
GWEN BOYNTON
Clerk of the Council

/s/ Edmond J. Muniz
EDMOND J. MUNIZ
Council President

PUBLISH ON: JULY 8, 1982, JULY 15, 1982 and JULY 22, 1982

EXHIBIT 26

AGENDA ITEM D-2

REAL ESTATE MATTERS

At the time of this mailing, we are not able to provide the specifics on two major proposals (items #1 and #2 below) that are presently being reviewed and evaluated by the Administration. Hopefully, by the November 12, 1981 meeting, we will be in a position to ask the Board's guidance and approval to finalize negotiations on these matters:

2. There has been a significant change in direction concerning the new hospital to be built in the City of Kenner. Loyola, property, more specifically the Monroe Tract, has again become a prime location, and there have been some preliminary negotiations with the developers.

November 1981

EXHIBIT 27

AGENDA ITEM D-2

Monroe Tract

Move that the Vice President be authorized to continue negotiations with the developers of the St. Jude Hospital, the purpose of which is to sell an amount of acreage not to exceed 75 acres between 35th Street and 40th Street (Vintage Drive) on the Monroe Tract, and to have the property between 35th Street and 40th Street rezoned in a more favorable manner to the University; however, before final ratification of the transaction, the matter will be first returned to the Executive Committee for approval.

JLE:cb
11/12/81

[REPORT TO LOYOLA BOARD OF TRUSTEES—MARCH 11, 1982]

LOYOLA UNIVERSITY
NEW ORLEANS, LA. 70118

March 15, 1982

TO: THE MEMBERS OF THE LOYOLA UNIVERSITY BOARD OF TRUSTEES

FROM: Thomas H. Clancy, S.J., Secretary of the Board

SUBJECT: Executive Committee Meeting
Thursday, March 11, 1982 at 3:00 p.m.

Present: Francis C. Doyle, A. Ransom Marlow, S.J., Hilton L. Rivet, S.J., James C. Carter, S.J., Thomas H. Clancy, S.J.

The Executive Committee took the following actions:

1. Prepared the Agenda for the March 25, 1982 Board Meeting.

2. Unanimously approved the following four proposals on motion of Father Clancy, seconded by Father Rivet:

   Hospital Site—Monroe Tract: To sell to John A. Liljeberg, Jr. approximately 80 acres of land in the Monroe Tract for $2.00 per square foot, or $87,120 per acre. The total sale price is $7,054,000. At the Act of Sale, the University will receive a net price of $6,694,000, or $1.90 per square foot (a $360,000 sales commission will be paid). In addition to the $1.90 per square foot, the purchaser will cause to have developed, at no cost to Loyola, a major boulevard of 3,290 linear feet running in a northerly direction from West Esplanade; this boulevard is a continuation of Loyola Drive. Also, the purchaser will have the University's remaining property from

West Esplanade to Vintage Drive favorably rezoned. The rezoning will be satisfactory to Mr. Eckholdt.

DeBartolo Corporation—Monroe Tract: Lease to the DeBartolo Corporation a site of 80 to 100 acres at a value of $3.00 per square foot with a 12% return. Mr. Eckholdt is authorized to lower the return to 11% if in his judgments other considerations can be obtained. The lease is to contain supplemental rent provisions commencing no later than the 10th year of the base term, but preferably after the 5th year; this determination will be left to Mr. Eckholdt's best judgment. The calculation of supplemental rent will be satisfactory to Mr. Eckholdt and will probably be related to the Consumer Price Index, or an equivalent.

There being no further business, the meeting was adjourned unanimously.

THC/jbb

Distribution: Executive Committee Members

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714
Sect. "A"

HEALTH SERVICES ACQUISITION CORP.

versus

JOHN A. LILJEBERG, JR.

Deposition of JOHN ECKHOLDT, 6363 St. Charles Avenue, New Orleans, Louisiana 70118, taken in the offices of MESSRS. SESSIONS, FISHMAN, ROSENSON, BOISFONTAINE & NATHAN, 2500 Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana, on Monday, the 6th day of May, 1985.

APPEARANCES:

MESSRES. SESSIONS, FISHMAN, ROSENSON,
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—and—

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John A. Liljeberg, Jr.

ALSO PRESENT:

HARRY S. HARDIN, III

REPORTED BY:

BONNIE G. GARNER, RPR
Certified Shorthand Reporter

* * * *

EXAMINATION BY MR. BOISFONTAINE:

[9] Q. Number 14 as well. Now, in terms of the minutes of the Loyola Board of Trustees, these minutes are prepared sometime shortly after the meeting is completed, is that correct?

A. That's correct.

Q. Okay. A matter of a few days?

A. Oh, no. Probably within four to six weeks after the meeting.

[10] Q. Then are they distributed to each member of the Board?

A. Yes.

Q. At their home address or whatever address they've given you?

A. Each identifies where the minutes are to be mailed.

Q. And this has been true throughout the relevant period?

A. Yes.

• • • •

[22] Q. Let's take a hypothetical Board of Trustees meeting set for February 1, 19-something. What would the Board get before the meeting, what documents, if any?

A. The Board would receive prior to that meeting a copy of the agenda—

Q. For that meeting?

A. —for the meeting on February 1st, '80.

Q. Right.

A. A copy of the minutes of the previous meeting, and various supporting documents that presentor members of the Board wish to discuss at the meeting of February 1, '80.

Q. Including such things as we've been discussing?

A. Possibly, yes

Q. Things from committees that wanted to present something?

A. Yes.

[23] Q. Do your files contain or record presently what was sent to the Board during the relevant period of time?

A. I would think that for the most part, they do.

Q. You, for example, keep a record of all the agendas that were sent out?

A. Yes.

Q. And all of the minutes, of course, you have a record of?

A. Yes.

• • • •

[28] Q. Okay. Now, we're talking about now 25, attendance records. Do the [29] minutes of the Board and committees indicate who was present and who was absent?

A. Yes.

Q. Is that invariably, always done?

A. Always.

Q. Are those attendance records reflected right in the body of the meetings?

A. Yes.

Q. Of the minutes, rather?

A. Yes.

Q. For the meeting that was held on such and such, present, absent?

A. It's the opening page of the minutes.

• • • •

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 81-4714
Section "A"

HEALTH SERVICES ACQUISITION CORPORATION

versus

JOHN A. LILJEBERG, JR.

Deposition of JOHN L. ECKHOLDT, given in the above-entitled cause, pursuant to the following stipulation, before Mary Lynn Stapleton, Certified Shorthand Reporter, authorized under the laws of the State of Louisiana to administer oaths to witnesses, given at Loyola University, Marquette Hall, Room 304, New Orleans, Louisiana, on the 28th day of May, 1985.

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[2]
APPEARANCES:

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[3]
ALSO PRESENT:

HARRY S. HARDIN, III

REPORTED BY:

MARY LYNN STAPLETON
Certified Shorthand Reporter
Official Court Reporter

• • • •

EXAMINATION BY MR. BOISFONTAINE:

[9] Q All right. So that there are five meetings a year, each of which are two months apart except for the summer?
A That's correct.

• • • •

[66] Q Let it go. It's not important. What is important, though, is the fact that you did report that Rigamer favored a hospital given certain hypothets?

A Yes.

Q Certain pluses?

A That's correct.

Q And you did in fact recommend that the Board authorize you to continue to negotiate with St. Jude at this [67] juncture?

A That's correct.

Q And St. Jude was Liljeberg?

A That's correct.

Q And the Board knew that?

A Yes.

Q And there was a resolution passed by the Board unanimously that you be authorized to continue negotiations with the developer of St. Jude Hospital, is that correct?

A That's correct.

• • • •

Q Now, was the rezoning of Loyola's lands tied in to any deal with St. Jude?

MR. SCHMITT: What's the question? Excuse me. I missed the question.

MR. BOISFONTAINE: Read it back.

[68] (Whereupon the Court Reporter read back the previous question.)

THE WITNESS: Yes.

BY MR. BOISFONTAINE:

Q And was that discussed with the Board?

A Yes.

Q Was, in effect, the favorable rezoning of residual Loyola lands an additional value that Loyola would receive in the event of a sale of property to St. Jude?

A Yes.

Q And was that the reason that St. Jude was reactivated as a negotiation point at this point in time?

A That's one of the reasons.

Q And was Mr. Liljeberg saying that would—telling you that he would help get this rezoning done?

A He would try, yes.

Q And was that a condition of sale?

A Yes.

Q So that no rezoning, no sale, Mr. Liljeberg?

A That's correct.

[69] Q And that was made clear to the Board, too?

A Yes.

• • • •

[88] Q You were concerned over the ownership of the certificate, were you not?

A Yes.

Q I mean it could have been a real thorn in the side of this whole deal with John Liljeberg?

[89] A It could have been.

• • • •

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714

Section "A"

HEALTH SERVICES ACQUISITION CORPORATION

versus

JOHN A. LILJEBERG, JR.

The deposition of MOISE S. STEEG, JR., taken in the above-entitled cause before Diane Tewis Clark, a Registered Professional Reporter, authorized to administer oaths of witnesses, pursuant to Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950, as amended, pursuant to the following stipulation, taken in the offices of STEEG & O'CONNOR, 1440 Oil & Gas Building, New Orleans, Louisiana 70112, on the 29th day of May, 1985.

APPEARANCES:

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—and—

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For John A. Liljeberg, Jr.:

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For Loyola University:

DENECHAUD & DENECHAUD
BY: THOMAS RAYER, ESQ.
1412 Pere Marquette Building
New Orleans, Louisiana

ALSO PRESENT:

George Patterson Manson, Jr.
Reported by Diane Tewis Clark, CSR, CP, CM, Registered Professional Reporter in and for the State of Louisiana.

* * * *

EXAMINATION BY MR. BOISFONTAINE:

[10] Q. Do you know what year that was?

A. I think I went on the board in the spring of '78 and served the next school year and then became chairman in '79.

Q. In the pring of '79?

A. In the spring of '79.

Q. You were chairman then until the spring of '82?

A. '81.

* * * *

[12] BY MR. BOISFONTAINE:

Q. We're here today to find out what you know concerning a sale of land by Loyola University to St. Jude Hospital of Kenner, Inc., a corporation created by a man name John Liljeberg.

Are you familiar with the fact that Loyola sold some land to St. Jude for the purpose of construction of a hospital?

A. Yes, sir.

Q. Are you familiar with the fact that Judge Robert Collins was a member of the board of the Loyola trustees?

A. Certainly.

Q. Was he a member of the board while you were president—chairman of the board?

A. We went on the board at the same time and he was.

Q. During the course of the various meetings that the board had, was the possible or potential sale of land known as the Monroe tract a subject of frequent [13] discussion?

A. Yes, sir.

Q. Over a course of how many years was such a possibility discussed, that you can recall?

A. I would say during the entire time I was on the board with an exception possibly of the first year. I don't remember it coming up when Mr. Oulliber was chairman of the board. I don't remember it at all that year. I don't say it didn't, I just don't remember it. It may have.

Q. During the period of time that you refer to, when you were chairman, Judge Collins was a member of the board when you were chairman the whole time?

A. Yes.

Q. Was sale of this land and the management of that Monroe tract an important financial matter for the university?

A. Certainly.

* * * *

[17] Q. We'll get more minutes that might help you refresh your memory in that respect.

Let me ask you some rather personal questions at this juncture concerning Judge Collins.

[18] Was he, in your view, an active member of that board?

A. Yes, sir.

Q. Did he participate in matters that were being discussed from time to time?

A. Certainly.

Q. Did he participate exclusively in the area of his own committee, the student affairs committee or was he more generally interested in board affairs?

A. He was selectively interested—he was selectively articulate on other phases of the board of affairs. I would not characterize him as a continuously outspoken person, but when he had an interest or a comment to make, he made it.

Q. Did he appear at all times, that you can recall, attentive?

A. Well, I felt he was a very interested member of the board and an active member of the board.

* * *

[23] Q. Do you recall at or about this time, i.e., late November, early December, 1979, being approached by Mr. Liljeberg for private attorney representation?

A. Yes.

Q. Can you tell me what happened at that time?

A. I received a call from an attorney whose name I do not recall, telling me that he wanted to talk with me about representing his client in what I expressed in my language a relatively sophisticated syndication of a land purchase and that he and his client would like to come up and talk with me about it and he was interested in a partnership agreement and an offering statement and he didn't say this, but this is what would [24] have come out of what he said.

Q. Did you know the attorney?

A. Not only I didn't know him, if I did, it didn't ring a bell and I can't remember his name independently now.

Q. Who was his client?
A. His client was Mr. Liljeberg.
Q. John Liljeberg?
A. John Liljeberg.
Q. Did you know him prior to that phone call?
A. I believe I had met him, but I can't say that I knew him because I didn't recall him when he came in.
Q. Then, this attorney—was it Travis Douglas, does that ring a bell?
A. I believe so. But I don't—I still couldn't swear to it. I don't independently recall.
Q. This attorney, in any event, and Mr. Liljeberg came to see you?
A. My recollection is that it was three persons that came to see me. The attorney, Mr. Liljeberg, and someone else and for the life of me, I looked all over [25] for some notes of the conference and I can't find anything.
Q. And was that year end 1979?
A. Either then or the first part of '80.
Q. You met with them?
A. (The witness nods head affirmatively).
Q. What came of the meeting?
A. He indicated to me that he was interested in buying a parcel of ground, that they were going to syndicate it, he wanted this and he would like to know if I could represent him.

I said, yes, I didn't see any reason why not.

Then we went into discussing what the property was and where it was and it turned out to be the Loyola tract.

And I said, I have considerable doubts about this. I don't believe I can handle it. I thought you would know if you're dealing with Loyola that I was on the board or chairman of the board.

And he stated that he did not.

[26] I said, I will consult with Mr. Denechaud, who is the attorney for Loyola, but I am confident that this would be a conflict of interest. I would not want to resign from the Loyola board to handle it.

I called Charles Denechaud, Sr.
Q. That's Mr. Rayer's partner?
A. Charles Denechaud, Jr., Mr. Rayner's partner. Charlie and I discussed it very briefly on the phone and, of course, we both agreed that I could not do this.

I don't know whether I advised him of this in writing or not, but in any event, I did tell him that I couldn't represent them and I made a report to this effect to the board and I recall that it was a January meeting, 1980 because I just looked at it a little while ago. I would not have remembered independently the date without looking at the meetings.
Q. You would, nonetheless, remember the event?
A. I remember the event very distinctly.

* * * *

[32] Q. I notice there was a formal motion made which carried unanimously that the board refer the St. Jude Properties, Incorporated offer to the real estate committee for further study and discussion.

Do you recall that that was, in fact, done?
A. Yes.
Q. Is there any doubt in your mind that Judge Collins knew about this offer by St. Jude Properties and Liljeberg and the activities of the university to discuss it?

MR. SCHMITT: Objection, it calls for an opinion as to the state of mind of Judge Collins and I don't believe that the [33] witness is in a position to state what was in Judge Collins' mind or what he knew.

MR. BOISFONTAINE: All right.

BY MR. BOISFONTAINE:

Q. Now, can I have my answer?
A. I don't think there was anyone on the board who was not aware of the St. Jude offer who was not aware of what I had to say and was not aware of the motion of the board because there are times at all board meet-

ings when there are lapses of attention, people have side conversations, but, usually, when it comes down to finances or disposition of the real estate, everyone is rather attentive.

Now, what was in Judge Collins' mind, I don't know. Judge Collins was there and the matter is important, the handling of that property is—was and is still an important factor in Loyola's finances and something that attention is given to.

* * * *

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4714

Section "A"

HEALTH SERVICES ACQUISITION CORPORATION

versus

JOHN A. LILJEBERG, JR.

Deposition of Judge Robert Collins, 500 Camp Street, New Orleans, Louisiana, taken at the Hale Boggs Federal Building, New Orleans, Louisiana, on the 25th day of June, 1985.

APPEARANCES:

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—and—

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(Attorneys for John Liljeberg, Jr.)

[2]
Also Present:

Harry Hardin

Reported By:

Ruby M. Wallen
Certified Shorthand Reporter

[3] STIPULATION

It is stipulated and agreed by and between counsel for the various parties hereto that the deposition of the aforementioned witness is hereby taken under the Federal Rules of Civil Procedure, for all purposes, in accordance with law;

That all formalities, save reading, signing, are specifically waived;

That all objections, save those as to the form of the question and the responsiveness of the answer, are hereby reserved until such time as this deposition or any part thereof, may be used or sought to be used in evidence.

---

[4] JUDGE ROBERT COLLINS, having been first duly sworn by the reporter, was examined and testified on his oath as follows:

MR. SCHMITT: The deposition is being taken for discovery purposes by agreement of both parties and subject to the usual stipulation. The deposition is being taken by me, the attorney for the defendant.

BY MR. SCHMITT:

Q. Judge, we thank you for making yourself available for this afternoon. We discussed the issue of written interrogatories in thinking this may inconvenience you a bit more, the completed procedure and the time delays and being inherent in this procedure, we decided to take a short deposition and get it over with.

I am sure you recall this case, Judge. Health Services versus Liljeberg. It has been bouncing around the courts for years. In any event, we have agreed to [5] the usual stipulation, waiving reading and signing and so forth. We can't, of course, do this for you. You are the witness. Whatever you choose.

A. I guess I would like to look at it before I acquiesce.

Q. Do you waive reading or signing.

MR. LUCAS: It is a wise decision since in one deposition you were referred to as Father Collins.

BY MR. SCHMITT:

Q. All of the different procedures that have been undertaken in these cases, there are very few as I see it, that will relate to this short deposition today. The rundown is that the initial declaratory judgment suit was filed by the hospital company on November the 30th, 1981. A trial on the merits was held before Your Honor on January 21 and 22, 1982.

On January 22 after the second day you ruled from the bench. You signed [6] your judgment on March 12, 1982. Your judgment was affirmed on appeal. Then on August 24, 1983, approximately a year and five months after you signed your judgment, the plaintiff, hospital company filed a motion seeking at your recusal from a new case they had filed, which had come down from Judge Parker in Baton Rouge. Then the next month in September of 83, you denied that motion.

In September, on September 27, 83, the plaintiffs filed a motion to vacate your initial judgment of March 12, 1982. Now, you denied that. It was that motion to vacate which was appealed to the 5th Circuit and the 5th Circuit reversed and remanded saying that they need additional factual information, so that that they could—in order to make a determination of the issue. The 5th Circuit Court's opinion is dated October 30, 1984, and in a nutshell, the pertinent portions before I start the questions is that on Page 3—

MR. LUCAS: [7] I would like the record to show an objection on my part to the attorney testifying. If he wants to ask the Judge specific parts from the opinion, question him about it, I think it is fine. I object to the testimony on the part of the attorney.

MR. SCHMITT: I am going to simply quote the opinion. All of these are quotes, in order to get the thing in perspective so the questions will not be misunderstood.

Page 3, the Court of Appeals said, well, a dispute was pending. Loyola had been conducting negotiations with Liljeberg for the sale of certain lands owned by Loyola for the purpose of building St. Jude Hospital. It transpires that Judge Collins had been a member of Loyola University's Board of Trustees since 1978.

On August 17, 1983, HSAC learned of Judge Collins' connection with Loyola and filed a motion to vacate and reverse, denying HSAC's motion to vacate. [8] Judge Collins cited three reasons for not vacating judgments and recusing himself. The court quotes you three reasons. The third of which is and I quote, "Again, finally and most significantly this Judge never served on either the real estate or executive committees of the Loyola University Board of Trustees, thus, this Judge had no participation of any kind in negotiating Loyola University's real estate transactions, and in fact had no knowledge of such transactions."

In commenting on the statement, the Court of Appeals says on Page 6, "This statement undoubtedly is true and we do not doubt the utter probity with which it was drafted, but it does not spell out with great enough specificity the temporal relation between his learning of Loyola University's interest and the final rendering of judgment."

It is for that reason I have four or five questions to ask.

A. Okay.

Q. On Page 6 the Court of Appeals [9] stated and I quote, "At this stage the record does not reflect exactly when Judge Collins learned of Loyola's interest."

So my question is, Judge, exactly when did you learn of Loyola's interest?

A. I learned of Loyola's interest following the judgment entered by this court on March the 12th, 1982. The document that first called my attention to it was the one that I hold in my hand, which are received before every board meeting. It is a combination of agenda of the meeting—this is a document which is a little brochure, in the nature of a brochure, which has an agenda of a meeting which was to be held on March 25, 1982, and it contained the minutes of the meeting, of a previous meeting of January 28th, 1982.

If you will note, from looking at the list of attendees at the meeting of January 28th, 1982, it indicates that I was absent from that meeting. It is true that when you read this, it mentions, [10] there are a few lines at Page 5 of the minutes of the Board of Trustees meeting of January 20th, 1982 under the heading Real Estate Committee Report, which mentions something about the St. Jude Hospital Corporation.

It states these following words: Well, maybe I should read the paragraph before the real estate committee report. It says, and this is the first full paragraph on Page 5 of the minutes of the Board of Trustees. "Mr. Gisevius, chairman of the committee, reported that the

board and the President's Council Real Estate committees met on January 22, 1982 and considered as well as ongoing negotiations with the de Bartolo Corporation and the St. Jude Hospital Corporation. Regarding the negotiations with the St. Jude Hospital Corporation, Mr. Eckholdt reported that the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation. If negotiations are brought to a satisfactory conclusion, [11] there is a great likelihood that there will be a major hospital built on the University's property."

The rest of the paragraph discusses negotiations with the de Bartolo Corporation. The last reference to St. Jude is in the last paragraph. "Mr. Eckholdt met with de Bartolo representatives January 29, 1982, at which time the de Bartolo representatives agreed to meet with St. Jude representatives to ascertain if both the hospital and shopping center could be built on the Monroe Tract."

Further on, the last paragraph on that page says, "If possible, these negotiations will not be concluded until the negotiations are completed with the St. Jude Hospital Corporation and the de Bartolo Corporation."

It was this, the reading of this that first gave me notice of the fact what was happening with the St. Jude Hospital Corporation. I guess the thing that particularly called my attention was [12] that of the federal court's mention here. I think this had reference to the decision that had been made by the court already from the bench, that was later followed up before the time that I received this with a written decision.

Now, following the receipt of the minutes, the January 28, 1982 meeting, and the notice and agenda concerning the March 25th, 1982 meeting, on March 15, 1982, I should not say on—a couple days following March 15, 1982 I received a letter, which I have in my hand, addressed to the members of the Loyola University Board of Trustees from Thomas H. Clancy, S.J., secretary of the board. This is the subject of the executive

committee meeting, which was held on Thursday, March 11, 1982 at 3 p.m. present were Francis C. Doyle, A. Ransom Marlow, Hilton L. Rivet, James C. Carter and Thomas H. Clancy, which notified me of the fact that the executive committee had met for the purpose of preparing the agenda for the March 25, 1982 board meeting and had unanimously [13] approved the four following proposals on motion of Father Clancy, and seconded by Father Rivet, the first of which I will quote. It says "Hospital Site, Monroe Tract: To sell to John A. Liljeberg, Junior approximately 80 acres of land in the Monroe Tract." It goes on. "For $2.00 per square foot or $87,120 per acre. The total sale price is $7,054,000. At the Act of Sale, the University will receive a net price of $6,694,000 or $1.90 per square foot (a $360,000 sales commission will be paid). In addition to the $1.90 square foot, the purchaser will cause to have developed, at no cost to Loyola, a major boulevard of 3,290 linear feet running in a northerly direction from West Esplanade; This bouelvard is a continuation of Loyola Drive. Also, the purchaser will have the university's remaining property from West Esplanade to Vintage Drive favorably rezoned. The rezoning will be satisfactory to Mr. Eckholdt."

Then on or about March 21 I [14] received another letter dated March 19, 1982. This time addressed—well, on the stationery of John L. Eckholdt, vice president of business of finance, labeled personal and confidential.

"TO: Members of the Real Estate Committee of the Board of Trustees and the President's Council. From: John L. Eckholdt, Vice President for Business and Finance, Subject: Monroe Trace."

It reads as follows: "Loyola University has entered into an agreement to sell approximately 80 acres in the Monroe Tract to John A. Liljeberg, Jr. Loyola will net approximately $6,694,000 or $1.90 per square foot. In addition, Loyola Drive will be extended 3,290 linear feet at no cost to Loyola and Loyola's remaining acreage south of Vintage Drive will be rezoned in a manner more favor-

able to Loyola. Mr. Liljeberg's development will include a 200-bed hospital, auxiliary support services, medical offices, etc., and a 25 acre development of luxury condominiums. I will give a full report [15] at our next meeting, but please call if you should want any further details." Signed John Eckholdt.

BY MR. SCHMITT:

Q. Through these three different communications that you have just testified concerning, those were the first times that you had learned that Loyola had any interest whatever in this particular lawsuit?

A. That is correct.

Q. May I see the booklet that you have concerning the agenda and the minutes of the Loyola meetings? Judge, did you receive this booklet under blue cover that you have testified to through the United States mail?

A. Yes.

Q. Do you recall the exact date on which you received it?

A. I could not tell you the exact date, but it was sometime after—it was probably two or three days after March 12. It is dated March 12. I received it probably couple days after that, two or [16] three days after that. That is the usual procedure.

Q. Is it customary you receive one of these booklets periodically prior to meetings of the Board of Trustees?

A. Correct.

Q. Do you recall after receiving this, whenever it was, this booklet, when you first read it?

A. It might have been, I could not tell you precisely, but I usually put those kind of things on the side and waited until I got close to the meeting time. Sometimes I didn't read them, or never read them all the way through. I can tell you that. In terms, I sat on the Loyola Board of Trustees for six years, from 1977 through 1983 and I have a file drawer that contains about at least four

or five linear feet of papers that I received during that time. You can see I was literally inundated with paper. I would scan the material from time to time. Read it when—if I thought there was something of particular interest in there.

[17] Q. What was the date of this forthcoming meeting that the booklet relates to?

A. March 25, 1982.

Q. You stated that you are not sure when you read it, but it might well have been a day or so before March 25, 1982?

A. Yes. I would have scanned it then or I would sometimes bring it to the meeting and scan it as the meeting was going on.

Q. It is not your practice as soon as it came in the mail, and you received it, to immediately read the full report?

A. Right.

Q. It was not your practice?

A. More than likely. Being involved in trials and that kind of thing, I guess I take the general philosophy, I try not to know anything any sooner than necessary. I usually read matters at the last minute as I receive—as I got close to time wher I needed, you know, [18] information on something. Or if I felt I had to refer to it.

Q. May I see the letter from Clancy, please?

A. Here.

Q. The letter from Thomas J. Clancy, S.J., secretary of the board, dated March 15, 1982, was that also received by you through the United States mail?

A. Yes.

Q. Do you recall when you first read that letter?

A. I could not tell you. I might have read it immediately. Usually what I did was, when I got stuff from Loyola pertaining to something like this, I would put it altogether.

In fact, as I searched through my files, I found this material. These two were inside of this booklet when I

started looking through this huge file drawer of material. I had these two. I probably put them in there and considered them at the time I considered the other [19] material that concerned that particular meeting.

Q. The letter from Mr. Eckholdt, may I see that, please? This is dated March 19, 1982. Was this letters received by you through the United States mail?

A. Yes.

Q. Do you recall the specific date in which you received it?

A. No. Again I have to rely on the general practice that I probably received it two or three days after the time that it was mailed, the date on it.

Q. But in all probability, you put the first brochure or booklet that Loyola sent you aside. You put the other two letters in the booklet apparently, and then, reviewed it shortly prior to the meeting of March 25, 1982?

A. That is correct. Right.

Q. These further questions will be, I am sure, redundant, but the 5th Circuit has posed these specific questions. Therefore, I would like for you to answer them.

[20] The 5th Circuit states in its opinion on Page 7, "The date to be ascertained is the one on which Judge Collins became aware of Loyola University's significant interest in the disposition of the suit."

Can you tell us on what date you became aware of Loyola University's significant interest in the disposition of the suit?

Let me say that, if you have already answered it, if your answer would be the same as you have answered before, if there is nothing you can add to it, then we will let the answer stand as to how you answered it first.

A. Maybe I need to think about it awhile.

Q. Excuse me.

A. Because, of course, this is kind of a two-prong question as to when I learned of that fact that Loyola had some interest in the property. I think I have answered as to that. Significant interest in the disposition of suit, at

the time I [21] found this out, the suit had already been disposed of. Therefore, Loyola's—I found out the full nature and extent of it when I went to the next board meeting, I guess you could say that.

Of course, reading this material, I found out that Loyola was proposing to sell this land to Mr. Liljeberg.

Q. The 5th Circuit opinion continues, "Whether this awareness came about before or after the date of final judgment, the record does not indicate."

Can you tell us whether your awareness came about before or after the date of final judgment?

A. My awareness came about after the date of final judgment.

Q. Then continuing, the 5th Circuit states, "Therefore, we must remand this case to the district court to be assigned to a Judge other than Judge Collins so that the court may determine precisely when Judge Collins learned of Loyola's interest."

[22] Can you tell us when you precisely learned of Loyola's interest?

A. It would be March 14th or March 15th, 1982.

Q. As I understand your prior testimony, you would say you may not have reviewed any of this material until a day or so before the March 25 meeting?

A. True.

Q. I don't—

A. I received the material on—maybe I am not being precise myself. I received the material on March 14th or 15th, but in all likelihood, I did not read this material and consider it until I got ready to go to the board meeting, which was my usual practice.

Q. So the precise date I assume would be the date that you read the material?

A. True.

Q. The 5th Circuit on Page 6 of its opinion states, "The question of knowledge, the extent of it and when it was acquired is crucial to the resolution [23] of this case."

Other than what you have testified to previously this afternoon, is there anything that you can add concerning your question of Loyola's, of your knowledge of Loyola's interest in the suit, both as to date and extent?

A. Well, I had no knowledge of the negotiations that Loyola was conducting with reference to this property until after the decision in this case. I think what—the way the Loyola Board of Trustees operates, it operates almost in a series of boards. Series of committees of boards for differing kind of responsibilities in different areas. The two key committees would have been the Real Estate Committee and the executive committee which was empowered to act for the board in these type of matters.

Q. Were you on either the executive—

A. I was not on either of these particular committees. I was on the student affairs committee. I was at one [24] time on the by-laws committee of the board. I certainly was not on either one of those two committees.

Q. Thank you, Judge.

BY MR. LUCAS:

Q. Judge Collins, I believe you have already stated, just to be clear, you were a member of the Board of Trustees of Loyola University from May, 1977 through May of 1983.

A. That is right. A period of six years.

Q. Do you recall who were the chairmen of the board during that time?

A. When I first went on the board, Mr. Oulliber was—who was former president of what, National Bank of Commerce I think it was, was chairman of the board. Then for a time Mr. Moise Steeg was president, was chairman. Mr. Doyle was chairman a part of that time. And also there was a lady that was president, whose name I can't remember.

Q. Lowery?

A. Ms. Lowery was chairman at [25] some point during that time.

Q. Is it correct you were chairman of the student affairs committee from May of 1978 through May of 1981?

A. That sounds about right.

Q. You have mentioned that you were also on the by-laws committee?

A. Yes.

Q. I believe you were also appointed as a member of the presidential evaluation committee back in March of 79.

A. That is correct.

Q. Were there any other committees that you had an opportunity to serve on?

A. No. I can' think of any.

Q. Judge Collins, with regard to the student affairs committee of which you were chairman from 78 through 81, how often did that committee meet? Approximately.

A. Perhaps quarterly. It was not a particularly high-impact committee of the board. We didn't have a great many serious problems about student affairs.

[26] Q. Do you recall whether the presidential evaluation committee met frequently?

A. No. It was kind of a special ad hoc committee of the board just for the purpose of complying with the good practice of the university to kind of reevaluate the president. We were reevaluating Father Carter to help to improve perhaps and upgrade his performance by telling him basically what we thought were his strengths and weaknesses as president basing it on some well recognized standards that we were applying in the situation. Kind of nationally recognized type standards of how a president should perform, both to encourage in things he was doing well and perhaps get him to do some other things we thought he should be doing better.

Q. Do you recall about how many meetings there were of this special committee?

A. Not offhand.

Q. Did you attend the meetings?

[27] A. Yes. I can't say that I attended them. If you ask me right now did I attend every meeting, I can't remember.

Q. I understand.

A. Quite a few meetings of the board I missed because sometimes I was out of town and sometimes I felt I was tied up in a case and had to stick with the case.

Q. Mr. Steeg, one of the former trustees of the board while you were serving on the board, Mr. Steeg's deposition was taken in this matter. He characterized you as being a very active and interested board member.

Do you characterize yourself that way?

A. I would say I did my best. I was not as active as I would like to have been. Being in this position, it is all consuming.

Q. Not enough hours in the day, is there?

A. No.

Q. We asked Mr. Steeg if he [28] recalled you were attentive. I felt he was a very interested member of the board and a very active one. You agree with that?

A. Yes.

Q. Now, Judge Collins, you just mentioned that you have a general practice, had a general practice of reading the minutes before the meeting or at the meeting itself. Is that your practice generally speaking with regard to receipt of the minutes?

A. Yes.

Q. Did you usually read the minutes?

A. Scan them; read them or scan them.

Q. I will direct my questioning to the time prior to the receipt of the three documents you referred to. Prior to that time, were you generally familiar with the tract of property known as the Monroe Tract owned by Loyola University?

A. Yes. I knew Loyola owned it.

Q. Were you acquainted with any [29] efforts on the part of Loyola to sell or lease parcels from that tract?

A. I knew that from time to time, you know, they got all kind of offers that were constantly coming forth by various parties. There was discussion from time to time about that.

Q. Did any particular names come to mind that you heard were interested in the property? Any at all, not necessarily parties involved in the suit.

A. Not at this time. No particular names come to my mind.

I guess the party—the only party, if you are asking me, the party that was constantly discussed in connection with the property was probably the Parish of Jefferson, City of Kenner, they wanted—they were having problems, they wanted to rezone it. Jefferson might have wanted to do something with the property. I remember that kind of thing coming up.

Q. Judge, as a matter of convenience, I will hand you, in the [30] interest of time, I don't intend to question you about everything there, so you will have before you, these are exhibits, A.J., which you have. Just a little thing on each of the exhibits I am giving you.

The first one is E5. If you look on just Page 1 of that, Judge, down at the bottom, there is reference to an offer to purchase some of the Monroe tract by a man named Sam Romano. Do you have any recollection of that?

A. No. I don't have any recollection.

Q. That is the only thing I have to ask you about that. The next one you will find is a document marked E7. Incidentally these designations really mean Eckholdt 7. We are keeping the same numbering system for convenience.

In E7, under the Real Estate Committee report which I think you will find on page 3, it refers to the fact that Mr. Eckholdt met with a group of developers acquiring a portion of Loyola's [31] property for a hospital facility to be called the St. Jude Medical Center. The minutes I believe show that you were present at that meeting, Judge Collins; is that correct?

A. E7?

Q. Yes, sir.

A. No, sir. I was absent from that meeting.

Q. I beg your pardon. Let's go back. E5 you were present?

A. E5 shows I was present.

Q. E7 you were absent. Were you at any time aware of, either through discussions with people inside or outside the board meeting, what-have-you, of the interest of St. Jude back in that point of time?

A. No.

Q. Judge, if I may, I will direct your attention to E8. E8 is the board meeting of January 24, 1980 and that does show you as being present; is that correct?

A. Right.

[32] Q. My questions are with regard to the Real Estate Committee report, which you will see on the top of page 5. You will find there I believe a reference to a meeting of the committee, January 7, 1980. At that time an offer from St. Jude Properties to purchase 75 acres of Loyola property was considered.

Do you see that in those minutes?

A. Yes.

Q. Real Estate Committee report discussed an offer made by Mr. Liljeberg to purchase some land in the Monroe Tract. Discussed with the board the fact that a certificate of need was needed from the State of Louisiana. Let me see. I don't want to misquote this. Recounted the fact that on March, January 15, 1980, a letter was sent to Liljeberg, who heads the group, to the effect the principal aspects of the offer were not acceptable to Loyola with $23,000 per acre being substantially below the amount Loyola would be willing to accept. Then there is [33] reference in the fourth paragraph on Page 5 to the fact that the very day of the meeting another offer came from St. Jude of $30,000 per acre.

Do you have any recollection of any of that meeting where you were in attendance?

A. No.

Q. May I direct your attention, Judge Collins, to the very last paragraph on Page 5. It refers to the fact that

Mr. Steeg reported that he had been approached by St. Jude Properties, the attorney for St. Jude Properties, requesting legal consultations with his client for the purpose of engaging his services in preparing a prospectus and a public offering to raise funds for the project without Mr. Steeg being aware that the land in question was Loyola's.

Once he was aware, he consulted with Mr. Denechaud and determined there was conflict of interest in his part and withdrew his services from the Liljeberg group.

[34] Do you recall any conversations about Mr. Steeg or a report of what Mr. Steeg did?

A. No. I do not.

Q. Did you have occasion to hear about it at a later time or through any discussion with any other board members?

A. I did not.

Q. Judge Collins, with regard to the same minutes on Page 8 is a report of the student affairs committee which you rendered at that meeting; is that correct?

A. Right.

Q. If you would, sir, I think the next set of minutes is E17. Is it correct that you were in attendance at this meeting of November 13, 1980 covered by the minutes marked E17?

A. Yes.

Q. I direct your attention to Page 4 of those minutes, please. The last paragraph at the bottom. It says there among the items discussed were an extensive study of Edward de Bartolo group. Continue negotiations with Hospital [35] Corporation of America.

Does this refresh your memory or do you independently recall any negotiations by Loyola as reported to the board with either the de Bartolo Corporation or with Hospital Corporation of America?

A. As I indicated earlier, I was aware of the fact, you know, of the Real Estate Committee negotiating with various people concerning the property, but I paid no par-

ticular attention to the names of the individuals, the corporations that were involved.

I guess the key question was, did I have in my mind that any particular individual or perhaps Liljeberg or Hospital Corporation of America, was interested the property. I did not at the time of the lawsuit. If I had, I would certainly have recused myself.

Q. If I understand you correctly then, what you are in effect saying, if you knew then, the beginning of the lawsuit or during the course of the [36] lawsuit, which you found out between March 15 and March 25, would you have recused yourself?

A. Yes. It was fait accompli as far as what had been done in terms of the lawsuit.

Q. Posing a hypothetical question, what you had known prior to that, do you think you would have recused yourself?

MR. SCHMITT: I object. It is immaterial. It has not happened. It is speculative.

MR. LUCAS: It is discovery. It is a deposition. I appreciate the Judge answering.

A. Yes. I would have recused myself if I had known there was a possibility of someone questioning my possible impartiality, because that is what the law requires.

BY MR. LUCAS:

Q. Judge, would you be so kind as to look at E19, which are minutes of the meeting of March 12, 1981 at which you [37] were present. E19. Here again, references are made under the real estate committee report on Page 2 to the de Bartolo Corporation and Hospital Corporation of America. I assume your response is the same as what I questioned you about previously?

A. Right.

Q. The next one is E20. I won't bother to question you about it. It was simply a reference on Page 5 to the de Bartolo Corporation. I assume your answer with regard to that is also the same?

A. Correct.

Q. On Page 7 of that minutes of the meeting of March 14 where you were in attendance, you gave a report at that meeting which appears on Page 7 for the student affairs committee?

A. Yes.

Q. Judge Collins, the next set of minutes is September 25, 1981 marked E21. This was a meeting at which you were in attendance; is that correct?

A. That is correct.

[38] Q. Under the Real Estate Committee report on Page 4, down in the middle of the second paragraph under the Real Estate Committee report beginning with the words "A new."

Towards the end of the line Mr. Gisevius reported that a new hospital had been approved for the Kenner area.

However, the group which received approval was not the Hospital Corporation of America, which has been negotiating with Loyola for a possible site on the university's Kenner land."

Do you have any recollection of that?

A. No. I have no direct recollection.

Q. The next set of minutes is before you, E21. I beg your p rdon. E22. This is E22. The minutes of the board meeting of Thursday, November 12, 1981 in which you were in attendance; is that correct?

A. That is correct.

Q. Judge Collins, if you look at [39] page 3 please, the Real Estate Committee report that begins down at the bottom. Mr. Gisevius reported that his committee met on October 23 and considered two items, the first item dealt with rezoning of 76 acre tract sale of approximately 10 acres of the tract to the City of Kenner.

Do you have any recollection of rezoning generally?

A. No. You have to understand how these committees operated. More or less the committee came in and made what was a relatively brief report and unless there was some significant dispute, the board would move to—wait a minute. The board would receive the report and no

particular note was made. This would be like one of, a paragraph like this would be one of a hundred items of equal significance would be discussed in a board meeting. There would be no reason for me to particularly remember something like this as against all of the other matters.

Sometimes we would get financial reports that we could go into [40] great detail, budget reports that might take up a lot of time. You would not remember any particular item in the agenda as being particularly significant or even a name as being particularly significant.

Q. I gather that committees, such as your student affairs committee and the real estate committee and other committees reported to the board with the chairman giving a report.

A. Yes.

Q. Would there ever be discussions by the board generally with those reports?

A. Sometimes there was, sometimes there wasn't.

Depending whether anyone thought there was any need to go into it. Reports of the Real Estate Committee about negotiations on property were not any, you know, as I said, maybe a hundred items of a similar nature that was discussed at a board meeting.

It was not something that I took particular note of. It came up [41] frequently. Nor that I remembered the names of any particular individuals involved.

Q. But I assume the Monroe Tract was a significantly valuable piece of property that demanded interest on part of the real estate committee and certain of the board members?

A. Yes. It came up for discussion from time to time.

Q. With regard to E22, would you be so good to read to yourself, if you will, the second motion that was made that appears on Page 4. It is the one that begins that the vice president—

A. E22?

Q. Yes, sir. It is very brief. I will read it. That the vice president for business and finance be authorized to continue negotiations with the developers of the St. Jude Hospital, the purpose of which is to sell an amount of acreage not to exceed 75 acres between 35th and 40th Street, Vintage Drive, on the Monroe Tract and to have the property between 35th [42] Street and 40th Street rezoned in a more favorable manner to the university. However, before final ratification of the transaction, the matter will be first returned to the executive committee for approval. Father Carter moved, seconded by Mr. Gisevius and carried unanimously, that the board approve the two resolutions as stated above."

Do you have any recollection of that, sir?

A. No. Not particularly.

Q. But you were present at that meeting?

A. I was present. Yes.

Q. As I understand from your earlier testimony when Mr. Schmitt was examining you, the practice of the board is to send out to the board members prior to a given meeting, the minutes and any attachment to the minutes from the previous meeting. Is that correct?

A. That is correct. The agenda of the meeting forthcoming as well as the minutes of the past meeting.

43] Q. The next two documents that you are going to find, which are labeled E23 and E24, I would like to direct your attention to E24 first.

There is a note that went to the board members to propose a motion to come before the board at the November 21, 198 board meeting regarding the Monroe Tract. The one at the bottom.

Move that vice president be authorized to continue negotiations with the developers of the St. Jude Hospital, the purpose of which, and then it goes on.

Do you recall receiving that?

A. No. I can't tell you that I did or didn't. I probably received it.

Q. I'm sorry.

A. I said I probably received it.

Q. The other document, E23, was a listing of real estate matters for the consideration of the board at their November 12, 1981 meeting, including a change in direction concerning the new hospital to be built in the City of Kenner. Loyola's property, more specifically, the [44] Monroe Tract, again has become a prime location.

I ask you, sir, if you have any recollection of having read that?

A. No. I have no recollection at all.

Q. E28 is a meeting of January 28, 1982 at which you were not present I believe; is that correct?

A. That is correct.

Q. If you will note Page 5, Mr. Gisevius as chairman of the real estate committee reported ongoing negotiations between de Bartolo Corporation and the St. Jude Corporation. He reported with regard to negotiations with the St. Jude Hospital Corporation that the federal courts have determined a certificate of need will be awarded to the St. Jude Corporation. Then it goes on.

I believe this is the document you were referring to as having been received by you prior to the February—wait. I don't know if that is correct. Prior to the March meeting, is that [45] correct?

A. Yes. That is this document along with the other two that focused, I said, my attention on this matter.

Q. The next and last set of minutes that I have, July Collins, is the March 25, 1982 meeting labeled E29 at which meeting you were present. I would refer you in this instance to the records of the executive committee beginning at the bottom of Page 1 and going over to the top of Page 2 where it simply reports that they had approved the sale to Liljeberg—

MR. SCHMITT: I object to any testimony relative to any documents relative or subsequent to March 12, 1982, the date that Judge Collins signed his judgment, so they are immaterial and irrelevant pursuant to the 5th Circuit's opinion and beyond the scope of the 5th Circuit—

MR. LUCAS: Your objection is noted as it was in the other deposition. Answer the question. Read it back.

[46] A. I think you directed my attention to it. I don't think you had asked the question.

MR. SCHMITT: I jumped the gun.

A. You didn't get to your question.

MR. LUCAS: Stipulated that your objection is continuous.

MR. SCHMITT: Pardon me. My objection is continuing and applies to subsequent questions in this deposition.

BY MR. LUCAS:

Q. With regard to the March 25, 1982 minutes, here is the report at the bottom of Page 1, top of Page 2 where the executive committee announced it approved the sale to Liljeberg approximately 80 acres of $2.00 per square foot. Then it goes on to say in addition there is to be a boulevard opened up and rezoning to be done by Mr. Liljeberg.

At what point, Judge Collins, [47] did you have knowledge of the facts that are mentioned in this Executive Committee report? What point in time? Do you recall?

A. Either at or shortly before this meeting when I read all of the documents I mentioned, the minutes of the previous meeting and the two documents that I received from Father Clancy and Mr. Eckholdt.

Q. These last two documents that you are referring to, Judge, you will find are the next two documents there. No point in belaboring this.

Documents E30 and E31, which I will ask be annexed to the deposition and assume these are the documents that accompanied your copy of the January 28, 1982 minutes, minutes of the meeting of that date of the Board of Trustees, which you received sometime between March 15, sometime around March 14, 15 or thereafter?

A. Correct.

Q. 1982. Next is your opinion, your minute entry of December 9, 1983 and [48] I direct your attention to page 3, the very last sentence, Judge, at the bottom.

MR. SCHMITT: This does not have an E number on it.

MR. LUCAS: I will not offer it.

MR. SCHMITT: What is it?

MR. LUCAS: The Judge's minute entry of December 9, 1983 where you mentioned that the Judge had no participation of any kind in negotiating Loyola University's real estate transactions.

As I understand your testimony, that was handled by the executive committee, the Real Estate Committee?

A. The real estate committee. Really subject to approval of the executive committee.

BY MR. LUCAS:

Q. In fact, you had no knowledge of such transaction. Do you mean by that you were not involved in the negotiating [49] process?

A. That is correct. Not only not involved, I didn't know about the matters, anything involving St. Jude or Mr. Liljeberg or anybody like that.

The first time I realized that the lawsuit and the land matters were related was after the decision had been rendered.

If you recall, the lawsuit in this case was filed in November and this matter came up quite quickly on the docket, because it was handled with priority, an expedited trial was held in the matter in two days, at which time an oral decision was rendered on the 22nd and subsequently followed by a written decision consistent with that in March, March 12.

Q. Judge, just a few more brief questions. I appreciate your patience. Just for the record, is it true that never once prior to the trial of this case, had you heard the name Liljeberg in connection with the Loyola tract?

A. That is correct. Didn't know [50] Mr. Liljeberg existed.

Q. Is it true that not once prior to the trial of this case or during the trial of this case that you had ever heard St. Jude, the St. Jude Corporation or St. Jude Properties or any other name with the St. Jude name in it of purchasing from Loyola University a portion of the Monroe Tract?

A. That is correct.

Q. At the trial itself, Judge, after the case was actually in trial, which I think you will find was on January 21 and January 22 of 1982, do you remember the name St. Jude? Of course, you remember the name St. Jude coming up then?

A. Yes.

Q. Liljeberg and Hospital Corporation of America?

A. Yes.

Q. Judge, when you were asked by Mr. Schmitt precisely when you learned of Loyola's interest, you said March 15, 1982. On further questioning you should have said, more correctly is that you received [51] the material on March 15, 1982, but in all likelihood, you didn't read the material—

A. Read them until I got closer to the meeting. I got three documents, I I think everybody agrees are crucial, the minutes of the previous meeting, plus the other two documents which were sent separately. Put them altogether in this brochure that had contained the agenda and the minutes, brought them to the meeting. It was my usual practice. Sometimes if I get letters from Loyola, I would stack it all up and bring all that material with me when I went to a meeting.

Q. I assume the constraints on your time had a lot to do with when you were able to read the minutes, how far in advance of a meeting?

A. That is correct.

Q. Were there ever occasions when you were able to read the minutes promptly after they were received, one day or two days after you received them?

A. I am sure there were, but I could not give you an independent [52] recollection. We are talking about a practice that went on over a period of six years. I think the meetings were held—I can't recall. Do you recall? They were about six times per year.

Q. Every other month, but I think three months in the summer, June, July, August.

A. No meetings held in the summer. One every two months during the regular school time.

Q. Judge Collins, during the period January 22 to March 12, 1982, that is the significance of that, the date of your oral decision and the other was the date of—during that interval, did you have any occasion to hear either the names, Liljeberg, St. Jude, St. Jude Properties, Hospital Corporation of America in connection with an interest in Loyola University?

A. No.

Q. —interested in purchasing property from Loyola University?

A. No.

[53] Q. No further questions.

MR. SCHMITT: I have no further questions.

MR. LUCAS: Let the record show, please, for record purposes, I will not annex all of this, A.J. I will send them to you. We have an agreement with Loyola we will whiteout or take out things that are not pertinent to this case because they were kind enough to give us the minutes. The ones that I shall annex are E7, E8, I beg your pardon. E22, E23, E24, E28, E29, E30, E31, E32.

Also, so the deposition will be complete, a copy of the Judge's minute entry of December 9, 1983 which I will simply mark Collins 1.

(Whereupon the taking of testimony of the witness was concluded.)

[54] REPORTER'S CERTIFICATE

I, Ruby Wallen, Certified Shorthand Reporter, in and for the State of Louisiana, do hereby certify that the within witness, after being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, did testify as hereinbefore set forth, in the foregoing pages;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel, or the parties hereto, and in no way interested in the outcome of this event.

/s/ Ruby Wallen
RUBY WALLEN, CSR

[55] WITNESS CERTIFICATE

I, Judge Robert Collins, do hereby certify that I have read the foregoing transcript, and it is true and correct, to the best of my knowledge and belief.

_____

JUDGE ROBERT COLLINS

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
MAY 22 1987
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CLERK

No. 86-957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,
Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether a court, granting a motion to recuse under 28 U.S.C. § 455(a) based solely upon an appearance of impropriety, may set aside acts taken prior to the filing of the motion.

2. Whether, under 28 U.S.C. § 455(a), a court may entertain a motion to recuse after the judgment has become final.

3. Whether, under 28 U.S.C. § 455(a), a judge is required to recuse himself on the basis of facts about which he has no actual knowledge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-957

JOHN A. LILJEBERG, JR.,
Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 796 F.2d 796, and is reprinted in the appendix to the petition for certiorari at Pet. App. 1a-13a. The opinion of the United States District Court for the Eastern District of Louisiana is unpublished and is reprinted in the appendix to the petition at Pet. App. 14a-35a. Earlier opinions of the court of appeals and district court, all unpublished, are reprinted in the appendix to the petition at Pet. App. 38a-93a.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1986. A Petition for Rehearing before the panel and a Suggestion for Rehearing *en banc* were denied on September 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition for a writ of certiorari was granted by this Court on March 9, 1987.

STATUTE INVOLVED

The statutory provision involved in this case, 28 U.S.C. § 455, is set forth in the appendix to the petition at Pet. App. 94a-96a.

STATEMENT OF THE CASE

The issues before this Court arise out of a motion, filed by respondent long after final judgment against it, to disqualify the trial judge and vacate the judgment on grounds of an appearance of impropriety. *See* 28 U.S.C. § 455(a). The district court denied the motion. The court of appeals reversed, ordering a new trial.

The proceedings, though extended, are relatively uncomplicated. The first stage of events began on November 30, 1981 with a lawsuit filed by respondent, Health Services Acquisition Corp. (HSAC), against petitioner Liljeberg to determine ownership of a corporation known as "St. Jude Hospital of Kenner, La., Inc." The State of Louisiana had issued a Certificate of Need, pursuant to 42 U.S.C. § 1320 a-1, in the name of St. Jude, for construction of a hospital facility. Pet. App. 15a.

A trial on the merits was held on January 21 and 22, 1982, before the Honorable Robert F. Collins, United States District Judge for the Eastern District of Louisiana. At the conclusion of the trial, Judge Collins indicated from the bench that he expected to rule for petitioner. On March 12, 1982, Judge Collins issued a judgment and opinion dismissing HSAC's suit and declaring Liljeberg the owner of St. Jude. Judgment was entered on March 16, 1982. Pet. App. 79a-93a.

The judgment of the district court was affirmed by the court of appeals on October 18, 1982. *Health Services Acquisition Corp. v. Liljeberg*, 691 F.2d 500 (5th Cir. 1982) (hereinafter *Liljeberg I*) (unpublished opinion). *See* Pet. App. 57a-78a. Respondent did not seek further review.

The suit, now ostensibly over, lay dormant until August 24, 1983, when respondent, pursuant to Fed. R. Civ. P. 60(b)(6), filed a motion to vacate the judgment and to order a new trial. The asserted grounds for the motion were that Loyola University ("Loyola"), a non-profit educational institution, had a putative interest in the litigation and that Judge Collins had been a member of Loyola's Board of Trustees.[1] Finding that "both subjective and objective impartiality [had been] assured," Pet. App. 50a, Judge Collins denied the motion. *See* Pet. App. 48a-50a.[2]

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[1] Over a period of several years, Loyola had conducted discussions with various organizations and individuals, including petitioner and respondent, regarding the construction of a hospital on property owned by the University. Reports on those discussions were made from time to time at board meetings, some of which Judge Collins had attended. *See* Pet. App. 17a-25a.

[2] In denying the motion, the court noted, among other things, that "Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy"; that "Loyola University is a non-profit educational institution, and any benefits insuring [sic] to that institution would not benefit any individual personally"; and that the judge had "never served on either the Real Estate or Executive Committees of the Loyola University Board of Trustees." Pet. App. 50a.

Respondent had also filed a similar motion in a related suit then pending before Judge Collins. That motion, too, was denied. *See* Pet. App. 51a-56a.

The Fifth Circuit reversed. *Health Services Acquisition Corp. v. Liljeberg*, No. 83-3657, slip op. (5th Cir. 1984) (hereinafter *Liljeberg II*) (unpublished opinion). See Pet. App. 40a-47a. In so doing, it accepted the statement of Judge Collins that, at the time of trial, he "had no knowledge" of Loyola's real estate transactions. Pet. App. 45a. It concluded, however, that the assertion did "not spell out with great enough specificity the temporal relation between his learning of Loyola's interest and the final rendering of judgment." Pet. App. 45a. It thus remanded the case for further proceedings before a different judge "so that the court may determine precisely when Judge Collins learned of Loyola's interest." Pet. App. 45a-46a.

On remand, the Honorable Charles Schwartz, United States District Judge for the Eastern District of Louisiana, found that Judge Collins first knew of Loyola's interest in the case on March 24, 1982, twelve days after he signed and rendered his judgment and eight days after the judgment was entered. Although matters relating to Loyola's real estate interests had been discussed at board meetings prior to that time—and Judge Collins had been marked as present at several of those meetings—the court found that, "despite all the prior discussions at board meetings and communications, [Judge Collins] did not recollect either Loyola's involvement or that the University could be affected by his decision." Pet. App. 25a. The court further found that, by the time that Judge Collins obtained actual knowledge (i.e., March 24, 1982), the interest of Loyola in the lawsuit had ceased to exist. Pet. App. 28a.

The court then went on to address the question whether Judge Collins had possessed "constructive knowledge" of Loyola's interest at the time of trial. It concluded that he had. It based its finding on the fact "that there was available to the Judge information regarding" the discussions with possible developers, including petitioner, and regarding the "import of the ownership of the certificate [of need] to Loyola." Pet. App. 30a. Because the court did not view "the Fifth Circuit's mandate as requiring recusal upon such conditions," it held that "recusal is not dictated by such constructive knowledge." Pet. App. 33a.[3]

The court of appeals again reversed. The court held that the judgment in favor of petitioner had to be set aside because "constructive knowledge" is sufficient for recusal under Section 455(a). Pet. App. 1a-13a.

The opinion of the court of appeals was divided into three parts, each dealing with a theory of recusal advanced by respondent. The court first rejected the argument that the judgment was invalid because Judge Collins had gained knowledge about Loyola's possible interest on March 24th, eight days after the judgment had been entered. Although the court held that Judge Collins should have recused himself immediately upon gaining actual knowledge, it noted that "[g]enerally a judge who learns that he has a financial or other interest in a case is only required to recuse himself from future proceedings." Pet. App. 8a (citations omitted). The court went on to observe that "the only effect of Judge Collins' recusal on March 24 would have been to allow HSAC to make any post-trial motions to a different judge, yet HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make." Pet. App. 8a-9a.[4]

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[3] The court thus found no occasion to resolve the issue whether recusal under 28 U.S.C. § 455 may be made retroactive or operates prospectively only. *See* Pet. App. 33a n.15.

[4] Given its holding regarding "constructive knowledge," the court of appeals found it "unnecessary to decide what the proper appellate remedy for this error would be." Pet. App. 9a.

The court, for similar reasons, rejected respondent's argument based on Judge Collins' knowledge of Loyola's interest prior to (but not at the time of) assignment of the case to him. Pet. App. 9a-10a. In doing so, the court distinguished several cases cited by respondent, in which judges had been recused on the basis of unrecalled information, pointing out that the facts had been brought to the judges' attention by the motions to recuse and that only prospective recusal had been sought. Pet. App. 10a; *see Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978); *Limeco, Inc. v. Division of Lime*, 571 F. Supp. 710 (N.D. Miss. 1983). The court held that the situation was different where the motion sought to invalidate past acts: "Since the judicial actions were taken without knowledge of those facts [indicating possible bias], no appearance of impropriety could arise merely because the judge knew the facts at some prior time." Pet. App. 10a.

The court of appeals then concluded, however, that recusal and invalidation of the judgment could be founded upon the "constructive knowledge" of the judge. Although the court recognized that Section 455 (b)(4) "requires that a judge *know* that he has an interest in the litigation before recusal is required," Pet. App. 11a (emphasis in original), it found no such condition in Section 455 (a). In its view, that section mandated recusal "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Pet. App. 11a.[5]

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[5] Following its earlier decision in *Hall v. Small Business Administration*, 695 F.2d 175 (1983), the court of appeals limited the circumstances to be known to "objectively ascertainable fact[s]." Pet. App. 11a. It held that a judge's "forgetfulness" was not such a fact. Pet. App. 11a.

While the court recognized that its rule could lead to unfortunate consequences, it expressly declined to follow the rule of the Seventh Circuit that "disqualification under Section 455 (a) runs only from the time that a recusal motion is made or granted." Pet. App. 11a-12a, citing *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986). The court reaffirmed that, in the Fifth Circuit, "a party may move to vacate a judgment based solely on an appearance of partiality existing at the time that the judgment was rendered." Pet. App. 12a.

SUMMARY OF ARGUMENT

The provisions of 28 U.S.C. § 455(a) state that "[a]ny justice, judge, or magistrate shall disqualify himself in any proceeding in which his partiality might reasonably be questioned." The court of appeals below applied that statute here, based upon a motion filed long after appeals had ended, to order retroactive recusal of the trial judge as of the filing of this case and, consequently, to set aside the judgment in favor of petitioner. The asserted ground for this result is that the judge should have known that a university, which he served as a trustee, had an interest in the case.

We believe that this decision is wrong, first, because it granted retroactive relief for an "appearance of impropriety" and did so on a post-appeal motion, and, second, because it read into Section 455(a) a theory of "constructive knowledge."

1. The invalidation of a judgment, pursuant to a post-appeal attack, is an unjustified remedy for an "appearance of impropriety." The Seventh Circuit has held, in fact, that retroactive relief is not available at all for violations of Section 455(a) absent a showing of actual bias or prejudice. *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1188

(1986); *United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985). Even if that broad rule is not adopted here, however, it is clear from the legislative history of Section 455 and the high standards for relief under Rule 60(b)(6) that invalidation of a judgment should be granted only in exceptional circumstances. The showing of an "appearance of impropriety," and particularly the showing here, are far from exceptional circumstances. *See* pages 10-25 *infra*.

2. In any event, an "appearance of impropriety," and the consequent obligation of a judge to recuse himself, should not be triggered by facts that he does not know but "should have known." This theory of "constructive knowledge" simply puts judicial rulings at risk for failure to perform a duty that no judge could ever perform. Moreover, it undercuts the provisions of Section 455(b)(4), where Congress made an affirmative choice to require knowledge of possible interests for disqualification. *See* pages 25-34 *infra*.

ARGUMENT

This case involves both a serious misuse and a serious misreading of 28 U.S.C. § 455(a), which provides for disqualification of judges "in any proceeding in which [their] impartiality might reasonably be questioned." By ordering retroactive disqualification here, based on a motion filed more than 17 months after judgment had been entered and after all appeals had been exhausted, the court of appeals has invited use of Section 455 to relitigate unfavorable rulings despite the absence of any genuine bias or prejudice. To make matters worse, it has made the starting point for disqualification, not just when the district judge actually knew of the facts suggesting partiality, but when he "should have known." Even the court of appeals felt obliged to note the "harsh

consequences" and "problems with regard to the finality of judgments" occasioned by its rule. Pet. App. 11a-12a.

The decision of the court of appeals merits reversal for several reasons. To begin with, under any of three possible rules, it is error to award post-appeal relief for a violation of Section 455(a) based solely upon an appearance of impropriety. The first rule, and the one now followed in the Seventh Circuit, would prohibit any retroactive relief under Section 455(a) in the absence of actual bias or prejudice. *See United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986). The second rule, which is suggested by the legislative history of Section 455 itself, would bar motions for relief under Section 455(a) once proceedings on appeal had been concluded. The third rule, drawn from the traditional standards under Rule 60(b)(6), Fed. R. Civ. P., would allow post-appeal relief only for the sort of exceptional hardship that seldom, if ever, results from a violation of Section 455(a). Although these rules vary in scope and flexibility, each would prevent open-ended relitigation of judicial decisions based on concern about "appearances" alone.

The court of appeals was also mistaken in concluding that a violation of Section 455(a) had occurred. In order to find the requisite appearance of impropriety, the court engrafted onto Section 455(a) a theory of "constructive knowledge" that calls for recusal by a judge *sua sponte* based on facts he does not know. Quite apart from its practical flaws, this doctrine necessarily presumes either that a judge is biased by an unknown interest or that he is dissembling about his state of knowledge. This unreasonable approach causes genuine unfairness to litigants, as well as considerable havoc to the judicial system, with little benefit to the policies sought to be served by Section 455(a).

I. Section 455(a) Does Not Contemplate the Granting of Retroactive Relief Based Upon Motions Made After Final Judgment On Appeal.

Although the focus of this case has necessarily been on the provisions of Section 455(a), it is important to recognize the procedural posture in which the issue of disqualification first arose.[6] Because the judgment in this case was rendered in March 1982, and affirmed without change by the court of appeals in October 1982, the motion filed by respondent in August 1983 was not, and could not have been, one to disqualify the trial judge from further proceedings: no further proceedings were contemplated. The motion, instead, was one to set aside the judgment pursuant to Rule 60(b)(6), Fed. R. Civ. P.[7] The court of appeals held that the motion should have been granted, relying on its rule "that a party may move to vacate a judgment based solely on an appearance of partiality existing at the time the judgment was rendered." Pet. App. 12a.

As discussed below, we think that the better rule forecloses an award of any retroactive relief under Section 455(a) absent actual bias or prejudice. *See United States v. Murphy, supra*; *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985).[8] This flat ban, of course,

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[6] Although the term "disqualification" at one time was used in contrast to the term "recusation," with the former connoting exclusion by force of law and the latter connoting discretionary withdrawal, *see*, Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law and Contemporary Problems 43, 45 (1970), this brief uses "disqualification" and the more modern term "recusal" interchangeably to mean withdrawal under Section 455.

[7] Rule 60(b) provides, in part, that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

[8] The discussion in this initial section takes as a given that a violation of Section 455(a) actually occurred; it is thus concerned only with when motions alleging such a violation may be made and what relief is available. In the following section, we set forth our reasons for believing that Section 455(a) is not violated by a judge who sits without knowledge of a possible interest.

would pose an insurmountable barrier to respondent here. At the very least, however, it seems clear that relief under Rule 60(b)(6) should be available, if at all, only in the most exceptional circumstances. A claim of an "appearance of impropriety," with no demonstration of prejudice, falls far short of that exacting standard.[9]

A. Only Prospective Relief May Be Granted Pursuant To Section 455(a).

The threshold question is whether a motion based solely on an "appearance of impropriety" under Section 455(a), even if meritorious, may invalidate judicial acts taken prior to the filing of the motion. We think that it cannot.

Our position derives initially from the language and structure of Section 455 as a whole. Under that statute a party may obtain recusal of a judge by resort to either the specific provisions of subsection (b) or the "catch-all" provision of subsection (a). If a party has been subjected to proceedings before a judge having an actual bias or prejudice against him, or a personal knowledge of evidentiary facts, or a direct and known financial interest in the case, or close family ties to an opposing party, he is able to seek recusal and possible retroactive

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[9] As we discuss at pages 22-23 *infra*, the court of appeals in this case found only "an appearance of impropriety," which, in turn, depended upon a finding of "constructive knowledge." Furthermore, under any view of the facts, the judge had no personal interest in the suit; the "appearance" was thought to rest entirely upon the interest of a university of which he was a trustee. *Cf. Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986) (direct and substantial financial interest); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (personal financial interest).

relief under the former subsection. Indeed, it was expected that the "specific standards [would] cover most of the situations in which the disqualification issue will arise . . . . Thode, *Reporter's Notes to the ABA Code of Judicial Conduct* 60 (1973).[10] It is thus only in those situations where more specific, and typically more serious, grounds are absent that a litigant will need to obtain recusal under the general provisions of Section 455 (a).

The legislative history indicates that Congress decided to go beyond the precise requirements of subsection (b), and to include the less concrete standards of subsection (a), in order "to promote public confidence in the impartiality of the judicial process . . . ." H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 6354-55. This concern about the appearance of impartiality was not original with Congress. In several earlier decisions, this Court had also recognized the importance of assuring, not just that trials are in fact fair, but that they appear to be fair. As this Court observed in *In re Murchison*, 349 U.S. 133, 136 (1955): "[T]o perform its highest function in the best way 'justice must satisfy the appearance of justice.'" *Id.*, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954).

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[10] Professor Thode was the Reporter for the Special Committee on Standards of Judicial Conduct, which was appointed by the American Bar Association to consider changes in the Canons of Judicial Ethics. He also testified at the Senate hearings in 1973 regarding the bill that became Section 455. *See* Judicial Disqualification: Hearings on S.1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. (1973) (Senate Hearings). [The 1971 and 1973 Senate Hearings are consecutively paginated; the 1973 hearings begin at page 73.] As the relevant House Report noted, Section 455 was enacted to "mak[e] the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Judicial Code . . . . H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6355.

The value attached to public confidence, however, does not mean that appearances of bias are, or always should be treated, the same as bias itself. When nothing more than prospective recusal is at issue, there is commonly no strong reason to make distinctions between actual bias and appearances of bias: the reassignment of a case from one judge to another will result, at most, in some inconvenience or delay. Indeed, Congress, in eliminating the so-called "duty to sit," H.R. Rep. No. 93-1453, *supra*, at 6355, acted on the basic assumption that the greatly expanded number of federal judges would allow for relative ease in transition. As Senator Burdick said: "Certainly at a time when there are 667 federal judges active and retired, and at a time when Congress is asked to create an additional 62 judgeships, it is not inappropriate for Congress to say that a judge, whose impartiality might reasonably be questioned, should step aside and let another judge handle the proceeding." Senate Hearings, *supra*, at 73. But, if all prior rulings of a judge are to be invalidated as well, the costs to at least one of the litigants and to the judicial system as a whole are far greater. To justify those higher costs, a showing of actual bias, not just an "appearance" of bias, should be required.

For these reasons, the Seventh Circuit has fashioned a rule prohibiting retroactive relief under Section 455(a), stating that "[i]n cases decided under § 455(a), disqualification runs from the time the motion was made or granted." *United States v. Murphy*, *supra*, 768 F.2d at 1539. *See also United States v. Widgery*, *supra*; *New York City Development Corp. v. Hart*, 796 F.2d 976 (7th Cir. 1986); *Falconer v. Meehan*, 804 F.2d 72 (7th Cir. 1986).[11] The rule was first set forth expressly in *United*

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[11] Although the language in *Murphy* is ambiguous, the Seventh Circuit has since held that disqualification should run from the time that a successful motion is made rather than granted. *New York City Development Corp. v. Hart*, *supra*, 796 F.2d at 979.

States v. Murphy, supra, where the court, noting that the defendant sought "not recusal but the nullification of everything that went before," concluded that "this is not the appropriate consequence of a recusal for appearance of impropriety." *Id.*[12] Rather, the court said, "[j]udicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts." *Id.* at 1541; *United States v. Widgery, supra*, 778 F.2d at 328 ("[d]isqualification for the appearance of impropriety runs prospectively only . . . ."); *see also Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986).

The Seventh Circuit has explained its rule by reference to the underlying purposes of Section 455(a), remarking that recusal for "appearances" under that section 'is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process." *United States v. Balistrieri*, 779 F.2d 1191, 1204 (1985), *cert. den. sub nom. Disalvo v. United States*, 106 S.Ct. 1490 (1986). See also *United States v. Murphy, supra*, 768 F.2d at 1540 ("§ 455(a) is concerned with perceptions rather than actual defects in the administration of justice"). The court has thus contrasted the provisions of Section 455(a) with those of Section 455(b), as well as 28 U.S.C. § 144 (discussed below), which require disqualification "because of actual or imputed bias." *New York City Development Corp. v. Hart, supra*, 796 F.2d at 978.[13]

[12] Although *United States v. Murphy* was a criminal case, the Seventh Circuit relied upon its earlier decision in *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). *See also New York City Development Corp. v. Hart, supra* (discussing *Murphy* and issue of appealability).

[13] As the Seventh Circuit pointed out in *United States v. Murphy, supra*, Section 455(e) itself draws a distinction between subsections (a) and (b), allowing waivers under the former, but not the latter, provision. 768 F.2d at 1540.

In *Hart*, the court noted that, while "[d]isqualification under these [latter] statutes is for the benefit of the parties . . .," Section 455(a) "is designed for the benefit of the judicial system as a whole, and even if a judge errs in failing to disqualify himself promptly, the error does not call into question the substantive decisions of the court." *Id.* at 978-79.[14] *See also Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 314 (7th Cir. 1986).

This approach makes considerable sense on several levels. In the first place, it seems more consistent with the practice followed under the other federal disqualification statute, 28 U.S.C. § 144.[15] Section 144 provides that a party may obtain recusal of a judge by filing a sufficient affidavit of bias and prejudice. In contrast to the procedure under Section 455, the judge faced with a Section 144 affidavit must take the allegations at face value: he may not pass upon the truth or falsity of the allegations, even if he knows them to be false. *Berger v. United States*, 255 U.S. 22 (1921). The statute thus, as a practical matter, imposes no requirement that a party demonstrate actual bias or prejudice, only that he be willing to swear to sufficient facts of such bias or prejudice.[16] At the same time, however, the relief is expressly limited to a directive that the judge "shall proceed no further

[14] The court has also held, for this reason, that a failure to step aside under Section 455(a) can be corrected only by mandamus and not by appeal after judgment. *See New York City Development Corp. v. Hart, supra*, 796 F.2d at 978-79.

[15] Several federal courts have recognized that the two statutes, while not identical, should be construed *in pari materia*. See *United States v. Faul*, 748 F.2d 1204 (8th Cir. 1984), *cert. denied*, 472 U.S. 928 (1985); *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978).

[16] Because a judge may not discredit the allegations of a Section 144 affidavit, regardless of his personal knowledge, we do not think that a failure to step aside under that section necessarily implicates substantial rights of the moving party. *But see New York City Development Corp. v. Hart, supra*, 796 F.2d at 978. No motion under that statute, of course, was made in this case.

therein, but another judge shall be assigned to hear such proceeding." By its terms, therefore, Section 144 entitles the moving party to prospective relief only. *See Marty's Floor Covering Co., Inc. v. GAF Corp.*, 604 F.2d 266 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980).

The Seventh Circuit rule is also more consistent with principles, like harmless error, which leave intact judicial rulings unless the asserted errors "affect the substantial rights of the parties." Fed. R. Civ. P. 61; *see also* Fed. R. Crim. P. 52(a); 28 U.S.C. § 2111. As this Court has stated, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942); *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956).

This principle is not rendered toothless merely because a litigant alleges prejudicial behavior by a trial judge or other trier of fact. For example, federal courts of appeals have frequently upheld judgments while observing that the actions of the trial judge were inappropriate or undesirable. *See, e.g., United States v. Lott*, 751 F.2d 717 (4th Cir. 1985), *cert. denied*, 105 S. Ct. 1852 (1985); *United States v. Singer*, 687 F.2d 1135 (8th Cir. 1982); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976); *Steinberg v. Ogden Foods, Inc.*, 501 F.2d 1339 (6th Cir. 1974). Likewise, "[t]he established rule is that the party seeking [a] new trial because of nondisclosure [of possible bias] by a juror must prove actual bias or prejudice." *United States v. Vargas*, 606 F.2d 341, 344 (1st Cir. 1979); *United States v. Currie*, 609 F.2d 1193 (6th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *United States v. Whiting*, 538 F.2d 220, 223 (8th Cir. 1976). In these and other areas, the courts have sought to distinguish between errors that are regrettable but harmless and those that cause genuine prejudice. The

distinction drawn by the Seventh Circuit between recusals under subsections (a) and (b) is to the same effect.[17]

Finally, the rule against retroactive relief based upon "appearances" serves as a practical deterrent to abuse of Section 455(a). While allowing claims for retroactive relief stemming from bias, prejudice, direct financial interest, and so forth, the Seventh Circuit plainly discourages efforts to retry unfavorable rulings by reliance on the more elusive provisions of Section 455(a). By contrast, the Fifth Circuit rule seems bound not only to stimulate relitigation but to concentrate attention on grounds having nothing to do with the merits of the lawsuit. Given the prospect of a retroactive recusal, it would be surprising if litigants did not see the chance of a future Section 455(a) motion as a valuable hedge against an unfavorable judgment. In the worst of cases, a litigant may deliberately withhold a challenge to the presiding judge, or at least refrain from seeking out facts for such a challenge,[18] with the thought that inaction will provide

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[17] Although the Seventh Circuit apparently assumes that recusals under Section 455(a) will not involve any showing of bias or prejudice, itself a specific ground for recusal under Section 455(b), its rule would seem to allow for such a showing to be made in a particular case. *See United States v. Murphy, supra*, 768 F.2d at 1541 (acts before motion may not be set aside "unless the litigant shows actual impropriety or actual prejudice"). Nothing approaching such a showing has been made here. See pages 22-23, *infra*.

[18] The Fifth Circuit rule, for example, rewards litigants for a failure to examine public records that might identify a possible interest at the start of the case. In this case, Judge Collins had listed the trusteeship of Loyola University on his financial disclosure form in May 1981, well before the case was filed, and in May 1982, while the case was on appeal. Had respondent made even a cursory review of those public documents, it could not have represented in August 1983, after the court of appeals had affirmed the judgment for petitioner, that it had just learned of that relationship. Yet, it was this belated discovery that led the court of appeals to order the judgment invalidated and to award respondent a new trial.

two chances to win his case. Even in less flagrant cases, a losing party may simply regard a claim based on perceptions of impropriety as one more strategy for attacking the judgment, increasing the number of challenges to federal judges and making all judgments subject to recall at the behest of a hypothetical "reasonable man." [19] While tolerance of such tactics may be a necessary evil in cases of actual impropriety or actual prejudice, there is no good reason to endure them when the only issue is one of "appearances."

It is evident from the legislative history that Congress wanted, insofar as it was possible, to inhibit use of Section 455 for purely tactical reasons. Thus, at the same time that it relieved judges of the "duty to sit" (*see* page 13, *supra*), it called particular attention to "the possibility that those who would question [a judge's] impartiality are in fact seeking to avoid the consequences of his expected adverse decision." H.R. Rep. No. 93-1453, *supra*, at 6355. It then cautioned that "a litigant's fear that a judge may decide a question against him" is not the same as "a 'reasonable fear' that the judge will not be impartial." *Id.* Of course, the language of this discussion—with its references to an "expected adverse decision" and "fear that a judge may decide a question against him"—gives a strong indication that Congress had in mind motions for prospective relief, not retroactive recusal. But, in any event, given its concern about strategic motions, it is highly unlikely that Congress wished recusal to be readily available *after* an adverse decision, or to give free rein to fears about partiality in light of an unfavorable ruling.

We believe, therefore, that the rule against retroactive relief under Section 455(a) strikes a proper balance between litigants' interests in a fair trial and their interests in not being subjected to repeated ones. Applied in this case, of course, it would leave the judgment in favor of petitioner intact.

[19] In *Aetna Life Insurance Co. v. Lavoie*, *supra*, this Court noted that rules regarding disqualification must be drawn narrowly lest "constitutional disqualification motions . . . quickly become a standard feature of class action litigation." 106 S.Ct. at 1588.

B. Section 455(a) Does Not Afford Relief After Direct Appeals Are Concluded.

Even if Section 455(a) does allow for retroactive relief, however, it should not be read to provide for relief on motions made after direct appeals have been concluded. Not only has Congress indicated that such motions would be untimely, but the very nature of challenges under Section 455(a) makes them inadequate as grounds for relief under Rule 60(b).

Although Congress did not include any express time limits for making motions to recuse under Section 455,[20] despite a recommendation by the Justice Department that it do so, H.R. Rep. No. 93-1453, *supra*, at 6358, the legislative history reveals quite clearly that Congress was aware of, and concerned about, the possible dislocations caused by belated resort to Section 455. As one Senator put it, "[i]f we are going to pass a bill here, we had better make sure that we have got a bill that is not going

[20] The issue of the "timeliness" of motions has been a source of disagreement in the courts of appeals. Relying on the lack of an express limit in Section 455, the Seventh Circuit has declined to read a condition of timeliness into its provisions. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (1977). Other courts of appeals, however, including the Fifth Circuit, have made timeliness a consideration under Section 455. *See, e.g., In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *United States v. Schreiber*, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980); *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982); *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984).

to cause all kinds of problems down the road." Senate Hearings, *supra*, at 18 (Senator Gurney). Thus, at both the House and Senate hearings, questions were raised about the possibility that litigants would use Section 455 to attack judgments long after the fact. Each witness addressing those questions indicated his belief that, except perhaps for violations of due process, motions would have to be filed no later than the end of the time for appeal.

During the initial Senate hearing, for example, Senator Bayh (who introduced one of the two bills then pending) was asked several times about the effect of uncovering possible violations after trial. Senator Bayh responded that, if a litigant learned about a ground for disqualification after trial, "then I think that he should allege it as long as the right to appeal still exists; but if that has been exhausted and time has expired, then, I think he has lost his right. I think there has to be some end." Senate Hearings, *supra*, at 22.[21] John Frank, testifying as an expert on judicial disqualification, expressed a similar opinion: "[Y]ou could raise the question of interest just as you can raise the question of no jurisdiction because there is no diversity, or no jurisdiction because there was no federal question, you can raise it in the course of the litigation, but not after the litigation is over." *Id.* at 36. Asked whether that view "need[ed] to be spelled out," Mr. Frank testified that "it is inherently implicit in the situation." *Id.*[22]

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[21] During an earlier discussion, Senator Bayh had made the same point: "After the time for appeal has run, I would assume a person would forfeit any right to reopen a case like that. That is normally what courts hold on appeal, if the protest, the allegation of impropriety, has not been made in a timely fashion." Senate Hearings, *supra*, at 18.

[22] After the quoted testimony, Senator Gurney then asked: "Well, let me see if I understand this. If the case is appealed, then when the appeal is rendered, the decision is rendered by the appellate court, that ends any possibility of raising the conflict of interest question?"

Mr. Frank replied: "At that point, it is res judicata, because under the cases the same would be true of an interest in diversity. If you find—once it is a final judgment, and it is entered, and you did not argue about that, it is the same as it was with no federal question, and it has been tried by blunder." Senate Hearings, *supra*, at 36.

The testimony during the House hearings was to the same effect. Judge Traynor, who had been the Chairman of the American Bar Association committee studying reform of the Canons of Judicial Ethics, expressed the opinion that, "where his disqualification was for a financial interest," then the failure to step aside "would raise a serious question as to whether that judgment would be subject to collateral attack." Hearings on S. 1064 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 93rd Cong., 2d Sess. 16 (1974) (House Hearings). He went on to say, however, that "[h]is sitting where he gives the appearance of impropriety and so forth, I doubt if that would be subject to collateral attack." *Id.* at 17. Mr. Frank, having said that direct appeal was available, again suggested that the threshold for making later attacks would be a very high one: "The question of collateral attack, whether it reaches the point that it becomes, as the judge has said, a denial of due process and is so void or whether it is mere error would require a set of qualifications that is beyond the scope of this bill or our commentaries." House Hearings, *supra*, at 17.[23]

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[23] Although this case does not involve a motion first made during direct appeal, and thus does not in any way turn on whether motions made during direct appeal are proper, we should note that the testimony quoted in the text is not inconsistent with the general rule against retroactive relief followed by the Seventh Circuit. The examples discussed by the various witnesses in the House and Senate hearings involved direct financial interests in a party, which are the sort of interest covered under subsection (b) and recognized by this Court as a possible basis of a due process violation. *See Tumey v. Ohio*, 273 U.S. 510 (1927). The Seventh Circuit has

This testimony strongly suggests that, at least absent a due process claim, motions under Section 455 may not be made at all after the time for appeal has passed. As Mr. Frank indicated, that is the rule followed for stale claims regarding lack of diversity or lack of a federal question. Although such claims may be raised for the first time on direct appeal, *see, e.g., Glidden Co. v, Zdanok*, 370 U.S. 530 (1962), they do not provide a basis for invalidating a judgment once appeal has passed. *See, e.g., Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982) (judgment not void and thus not subject to challenge under Rule 60(b)(4) for want of diversity). If anything, claims to set aside judgments under Section 455(a) are less compelling than those based upon a lack of any jurisdiction at all.

Even a more generous treatment of post-appeal motions cannot help respondent, however, for, at a minimum, it is plain that such claims should be granted only in unusual and exceptional cases. Nothing whatever in the legislative history of Section 455 reveals an intent to *relax* the normal standards for relief under Rule 60, which requires a showing that failure to vacate the judgment will cause "extreme hardship or injustice." 11 Wright & Miller, *Federal Practice and Procedure* § 2864, at 219-220 (1973). The well-accepted doctrine is that relief under Rule 60(b)(6) "is reserved for extraordinary cases." 11 Wright & Miller, *supra*, § 2864, at 219; *see Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981).

This standard is one that respondent simply cannot meet. The court of appeals did not point to, and respondent has not made, any showing of exceptional hardship. To the contrary, the Fifth Circuit explicitly rested its decision on nothing more than "an appearance of impropriety under 28 U.S.C. § 455(a)." Pet. App. 1a. Furthermore, even that "appearance" depends upon the notion that the trial judge might be thought to know about an interest of which he was concededly unaware. Pet. App. 11a-13a.[24] At best, therefore, respondent is two steps removed from a demonstration of genuine bias or interest affecting its case.

indicated that motions for retroactive relief under that subsection may be granted. See *United States v. Widgery, supra*.

The difficulty faced by respondent is not peculiar to its case here: a claim based only upon "appearances of impropriety" is, by its very terms, incompatible with the need to demonstrate the requisite hardship under Rule 60(b). As we have previously discussed, *see* pages 11-15, *supra*, the injury caused by a failure to grant recusal under Section 455(a) is primarily, if not totally, to the judicial system itself. While it is sensible to have a prophylactic rule to protect against such injury, it would elevate form over substance to go further by throwing out valid judgments for that reason alone. At some point, concern about real injustice to the successful litigant, forced to surrender his judgment and begin again, should outweigh concern about an appearance of injustice to the unsuccessful one.

The reasons for limiting retroactive relief for "appearances of impropriety" are all the more compelling when the challenge is first raised after appeal. Almost by definition, any grant of retroactive relief imposes a penalty on one litigant, while holding out the promise of a windfall for his opponent. Although reversals of fortune are to be expected as part of the appellate process, albeit usually on grounds previously argued,[25] expectations are

[24] As we discuss below, *see* pages 25-34 *infra*, the theory of "constructive knowledge" is misplaced as part of Section 455(a). Even if that section did encompass claims based upon "constructive knowledge," however, they would seem particularly unsuitable occasions for litigants to assert unusual hardships.

[25] Even during normal appellate proceedings, various courts of appeals have said that post-judgment motions to disqualify will be

far more settled once appeals have come to an end. At that point, it is highly likely that a prevailing litigant will have gone forward in reliance on the final judgment, without regarding the determination of his rights as tentative or preliminary.[26] Indeed, the Fifth Circuit itself recognized "the problems with regard to the finality of judgments [caused] by allowing a party to overturn a judgment rendered months or years earlier based on the appearance of partiality, even though the judge was in fact completely impartial." Pet. App. 11a. Having called attention to the problems, however, the Fifth Circuit explicitly refused to follow the course taken by the

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subject to more stringent review. Thus, in *United States v. Schreiber*, 599 F.2d 534 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979), the court of appeals allowed a defendant to raise his claim under Section 455 for the first time on appeal, but reviewed it under a standard of "plain error" rather than the customary "abuse of discretion." The court indicated that reversals for plain error typically involved situations where the error was "grievous," or "so fundamental in nature as to deprive a party of fundamental justice," or so serious as to "constitute[] a 'manifest miscarriage of justice.'" *Id.* at 535. Other circuits follow a similar rule. *See Weiss v. Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302, 304 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Hamm v. Members of the Board of Regents of the State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983); *Crowder v. Conlan*, 740 F.2d 447, 454 (6th Cir. 1984) (Section 144 claim). *See also Davis v. Cities Service Oil Co.*, 420 F.2d 1278, 1282 (10th Cir. 1970) ("[p]romptness in asserting disqualification is required to prevent a party from awaiting the outcome before taking action").

[26] Since the time that the judgment in this case became final (following affirmance by the court of appeals), petitioner has constructed a hospital pursuant to the Certificate of Need at issue in the underlying lawsuit. It would cause obvious turmoil if a court were to rule that, despite the prior final judgment, the Certificate of Need had belonged to respondent all along. Even if petitioner should prevail a second time upon the retrial, the added costs of another proceeding, combined with the upheaval prevailing in the interim, would be substantial. Indeed, as the pages of post-1982 docket entries reveal, the final judgment entered in that year has proved anything but final.

Seventh Circuit, or any other course for that matter, to avoid them.

This attitude is much too insensitive to the countervailing interest in finality of judgments. Although there is concededly an important interest in promoting public confidence in judicial proceedings, it does not follow either that this interest is the only interest at stake or that it is served only by the largest possible number of disqualifications. As this Court has recently emphasized, "'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.'" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), *quoting Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). Indeed, it seems unlikely to promote much public confidence if judgments, and the benefits and duties that ensue from them, are continually open to question because dissatisfied litigants may develop claims about appearances of impropriety. A proper respect for the finality of judgments is itself a benefit to the judicial system as a whole.

For all these reasons, even under the most favorable possible rule for respondent, it should be the rare case in which a motion to vacate a judgment is granted because of a violation of Section 455(a). It is a considerable understatement to say that respondent has shown no exceptional grounds for relief here.

II. Section 455 (a) Does Not Incorporate a Standard of "Constructive Knowledge."

The discussion in the previous section assumes, *arguendo*, that a violation of Section 455(a) actually occurred in this case. In fact, no violation did occur. Although a separate district judge found (and the court of appeals accepted) that Judge Collins did not know about the involvement of petitioner with Loyola University from

the beginning of the suit until after his judgment had been issued, the court of appeals held that he was subject to recusal because he "should have known." This conclusion is a misreading of Section 455(a).

Before turning to the merits, we should note the link between this issue and that of retroactivity. If disqualification runs only from the time of filing a motion, *see United States v. Murphy, supra,* then the imposition of a standard of "constructive knowledge" is largely beside the point: actions taken prior to the motion would stand and the motion itself presumably would create actual knowledge on which to base prospective recusal. *See Rice v. McKenzie, supra*; *Limeco, Inc. v. Division of Lime, supra.* Thus, only if Section 455(a) requires invalidation of past actions, is it necessary to decide at what point a judge is deemed disqualified. We think that the *earliest* point should be when the judge actually knows of the facts requiring recusal.[27]

The most obvious problem with the Fifth Circuit position is that it requires a judge to do an impossible act: recuse himself on the basis of facts that he does not know. Unlike Section 144, which is activated by the filing of an affidavit of bias and prejudice, the provisions of Section 455(a) are intended to be self-executing. *See, e.g., United States v. Wolfson,* 558 F.2d 59, 62 (2d Cir. 1977); *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977). If recusal is required as soon as a judge

[27] As the findings of fact make clear, Judge Collins did not have actual knowledge after the lawsuit was filed until March 24, 1982—eight days after judgment was entered. Pet. App. 28a. The court of appeals recognized that disqualification as of that date would have made no practical difference because "the only effect of Judge Collins' recusal on March 24 would have been to allow HSAC to make any post-trial motions to a different judge, yet HSAC would not have been entitled to a new trial based on Judge Collins' obtaining actual knowledge on March 24 and apparently it had no other post-trial motions to make." Pet. App. 8a-9a.

should have known of a possible interest, then he is literally obligated to act when he knows of no reason to act. It is fanciful to suppose that Congress meant to impose on judges a duty they could not possibly perform, while requiring that judgments be invalidated as the penalty for not performing it.

A second problem with the "constructive knowledge" theory is that it works at cross-purposes with the provisions of Section 455(b)(4). That subsection, by its plain terms, requires a judge to recuse himself only when "[h]e knows" that he has a financial or other interest in the proceeding before him. While subsection (a) concededly may reach conduct that subsection (b) does not, it would make little sense for Congress to include the element of knowledge in the latter section only to see it immediately read out again in the former. Yet, under the rationale of the Fifth Circuit, a judge violates subsection (b) if he sits knowing of a financial interest and subsection (a) if he sits without knowing of it.[28]

Although it might be possible to reconcile these provisions by reading "constructive knowledge" into (b)(4) as

[28] While it might be argued that ownership of a small amount of stock would not be enough to create an appearance of partiality, the specific provisions of Section 455(b)(4) were intended to eliminate just that sort of guesswork. H.R. Rep. No. 93-1453, *supra,* at 6351-56. Unlike the earlier standard in Section 455, which required a "substantial interest," the standard of (b)(4) is that any financial interest, however small, is grounds for disqualification once the court becomes aware of it. The reason for this absolute standard was to avoid "uncertainty and ambiguity about what is a 'substantial interest' . . . ." *Id.* at 6356. It would simply reintroduce that uncertainty and ambiguity into subsection (a) if unsuccessful efforts to disqualify based upon actual knowledge were turned *ipso facto* into attacks based on "constructive knowledge" under subsection (a).

We assume that there may be cases in which the personal interest is so extensive as to compel a finding of actual knowledge. *Cf. Davis v. Xerox,* 811 F.2d 1293 (9th Cir. 1987) (facts did not justify finding of actual knowledge). Once again, however, we note that the opposite finding was made in this case. Pet. App. 28a.

well, that solution will not wash. First of all, the plain language of (b)(4) would seem to prohibit it. Moreover, given the strict standard of (b)(4) regarding financial interest, there is no basis for doubting that Congress meant what it said: a requirement of knowledge provides a necessary protection for judges against inadvertant failures to recuse.[29] Indeed, Congress had before it, but did not pass, a bill (S. 1886) that would have dispensed with any requirement of knowledge, calling instead for disqualification in any case in which the judge "has an interest." Also, it appears that the notion of "constructive knowledge" was once proposed for, but not included in, the Code of Judicial Conduct, on which Section 455 is modeled. *See* Interim Report of the Special Committee on Standards of Judicial Conduct (mimeo. June 1970), cited in *Frank, supra*, note 6, at 63.[30]

To date, no court applying (b)(4) has ever struck down actions taken before the judge actually learned of the relevant financial interest. For example, in *In re Cement and Concrete Anti-Trust Litigation*, 515 F.Supp. 1076 (D. Ariz. 1981), *mand. denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (1983), the district judge had made numerous rulings in a class action before learning that his wife owned stock in several class members. In deciding that he was obliged to recuse himself

[29] During the Senate Hearings, at least one Senator suggested that the requirement of knowledge would take care of situations in which a judge had not learned about certain holdings. *See* Senate Hearings, *supra*, at 38 (Senator Burdick).

[30] The Fifth Circuit appears to have accepted that "constructive knowledge" is not enough to support recusal under subsection (b)(4). Pet. App. 11a. If the court had believed otherwise, it could not logically have decided that Judge Collins' prior knowledge, which he had forgotten by the time of the suit, was inadequate to support invalidation of the judgment under (b)(4). Pet. App. 9a-10a.

prospectively, the judge emphasized that "article 455 does not require disqualification until a Judge 'knows' that he has a financial interest." *Id.* at 1081. The same approach was followed in *Catherines v. Copytele, Inc.*, 608 F. Supp. 1031 (E.D.N.Y. 1985), where the judge made numerous rulings while unknowingly holding stock in the parent company of a defendant, and in *Union Carbide Corp. v. U.S. Cutting Service, Inc., supra*, where the trial judge had presided over a class action for more than a year after marrying a man who owned stock in a class member. Indeed, in *Union Carbide Corp.*, the judge was permitted to resume service on the case after her husband sold the stock at issue.

As was noted in several of these cases, it fits with common sense to date recusal only from the time of actual knowledge. The trial judge in *In re Cement and Concrete Anti-Trust Litigation* observed: "Until he is so informed, how can there be a conflict? *How can there even be the appearance of impropriety?* More importantly, how can it be contended that his past decisions could be affected by a financial interest of which he was unaware." 515 F. Supp. at 1081 (emphasis added). Similarly, the Seventh Circuit in *Union Carbide Corp.* remarked that, before the trial judge discovered the interest, "she could have had no incentive to favor the plaintiffs." This eminently reasonable observation seems just as pertinent to questions about "appearances of impropriety" under subsection (a).[31] Yet, under the Fifth Circuit's theory, each of the judges presumably could have been charged with "constructive knowledge" of the various stockhold-

[31] The Fifth Circuit in this case, while discussing and rejecting respondent's claim based on prior knowledge, observed: "Since the judicial actions were taken without knowledge of those facts, no appearance of impropriety could arise merely because the judge knew the facts at some prior time." Pet. App. 10a. Yet, when the court devised its "constructive knowledge" theory, and found an appearance of impropriety, it relied on just that prior knowledge to force disqualification. Pet. App. 12a-13a.

ings, and thus disqualified under Section 455(a) from the time that ownership was acquired.

At bottom, the theory of "constructive knowledge" depends upon an ill-conceived version of the "reasonable person" test. The usual test is a straightforward one: "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." Thode, *Reporter's Notes*, *supra*, at 60. If that test were applied according to its literal terms, there could be no grounds for disqualification prior to actual knowledge because the reasonable man knowing "all the circumstances" would understand that a judge could not be influenced by unknown interests. The Fifth Circuit, however, has decided that the test should be whether "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of the facts indicating his interest or bias." Pet. App. 11a. Furthermore, the court has limited "all the circumstances" to those "that are objectively ascertainable." *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

The effect of these revisions is to make the "reasonable person" test illogical. According to the Fifth Circuit, the "reasonable person" knows everything about a judge's interest in the case, but does not know whether the judge knows it. But if the judge does not in fact know of the interest, then there is no reason for a "reasonable person" to suspect bias; it is the judge's *knowledge* of a possible interest that theoretically might lead the judge to favor one party over another. It is one thing for a judge to sit in a case when he knows of an interest in it, quite another for him to sit when he does not know.

So far as we can tell, there appear to be two principal justifications offered for the "constructive knowledge" rule. In its opinion below, the Fifth Circuit said that its doctrine would "discourage[] a judge from ignoring or

failing to investigate a possible conflict of interest." Pet. App. 12a. In addition, respondent has suggested that the doctrine avoids an embarrassing inquiry into a judge's actual state of mind. Brief in Opposition at 17-20. In both cases, however, the cure is worse than the problem.

While it might be true that the approach taken by the Fifth Circuit would incite more judicial diligence, that observation is only the starting point for analysis. No one disputes that judges should be alert to possible grounds for recusal. Subsection (c) of Section 455, in fact, expressly states that "[a] judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." Professor Thode, testifying about the obligation to be informed, stated that a judge "should be subject to sanctions for violation of this provision." Senate Hearings, *supra*, at 96. But the Fifth Circuit approach does not penalize the judge: it penalizes one of the litigants by requiring invalidation of a judgment won after an admittedly impartial trial. As the Seventh Circuit has sensibly stated, "[a]n appellate court's desire to encourage use of a practice should not produce injury to a party who has rightly prevailed." *Walton v. United Consumers Club, Inc.*, *supra*, 786 F.2d at 314.

We also think that, insofar as this case is concerned, the Fifth Circuit was enforcing a duty that does not exist. While Section 455(c) does talk in terms of being informed about both "personal and fiduciary financial interests," the legislative history makes clear that the latter term refers to "[t]he interest held by a judge *as a family fiduciary*." Senate Hearings, *supra*, at 94 (Professor Thode). As Professor Thode explained, the provisions of subsection (b) "draw a line between a judge's interests as a fiduciary for a 'private' trust or estate and some of his interests as a fiduciary for what could broadly be considered a public institution—an educa-

tional, religious, charitable, fraternal, or civic organization." *Id.* at 97.[32] This line was thought necessary, "as a matter of policy," to allow judges to serve in fiduciary positions for such organizations without being subject to recusal on the basis of the organizations' often widespread investments. *Id.* at 105. Because it is his interests as a *private* fiduciary that subject a judge to disqualification under subsection (b), it is logically those interests about which he has the specific duty to be informed.

Another difficulty with the reasoning of the Fifth Circuit is that it is of marginal relevance to this case and, likely, many others. The problem here did not arise because Judge Collins was unaware of a personal holding or position: obviously, he knew that he was a trustee of Loyola University. What he did not know, and what the Fifth Circuit held him accountable for knowing, was that Loyola might have an interest in a particular case before him. As the cases arising under subsection (b)(4) indicate, however, it is far more difficult for a judge to know, not just what he owns, but how a particular lawsuit might affect it. *See, e.g., Union Carbide Corp. v. U.S. Cutting Service, Inc., supra,* 782 F.2d at 712 (person without technical background would not anticipate that company would be member of class limited to buyers of industrial gases). As was the case here, where the suit made no mention at all of Loyola or of its land holdings, the ability of a judge to recognize a possible interest cannot be determined simply by reviewing personal financial statements. It seems particularly harsh, under these circumstances, to make lack of knowledge into a basis for setting a judgment aside.

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[32] Although Professor Thode was speaking specifically about provisions of the Code of Judicial Ethics, the provisions of Section 455 are essentially identical. As we have previously noted, *see* note 10 *supra,* Congress intended to make the statute conform to the provisions of the Code with limited exceptions.

Finally, we note that any marginal increase in judicial attentiveness may be more than offset by a decrease in diligence by the litigants. As we have already discussed, in some cases a litigant may choose to see the judgment entered by the court before deciding whether to raise (or investigate) facts about an appearance of impropriety.[33] This inclination may be reinforced if the litigant understands that his right to recusal is the same whether or not he has brought facts about a possible interest to the attention of the judge. As the Seventh Circuit stated in *United States v. Murphy, supra,* "[a] criminal trial is too serious and costly to permit a defendant to sit on possible errors, hoping to have a crack at an acquittal (or low sentence) and then still a second trial." *Id.* at 1541. This observation seems no less apt in civil cases.[34]

The concern about subjecting judges to inquiries about state of mind is, admittedly, not an unserious one.[35] But the alternative, as we have discussed, is to apply an irrebuttable presumption, based on circumstantial evidence, that judges know what they often do not know. This presumption seems wholly out of place within the provisions of Section 455(a). Although there may well be

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[33] If the facts are ones indicating a reason to favor the other party, there would seem to be little risk that a judgment *against* the other party could be overturned. A litigant withholding such facts, therefore, might reasonably believe that he had much to gain, but little to lose.

[34] The Fifth Circuit said that "[o]n August 17, 1983, HSAC learned that Judge Collins was and had been a member of the Board of Trustees of Loyola University." Pet. App. 2a. As we have pointed out, however, see note 18 *supra,* that information had been included in Judge Collins' financial disclosure statement filed on May 15, 1981, more than six months before the suit was filed. It was included again in the statement filed on May 15, 1982, while the case was pending on appeal.

[35] It is, of course, a common practice for legal issues to turn upon a particular state of mind. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (subjective test for actual knowledge or reckless disregard of falsity).

the exceptional case in which a judge falsely denies knowledge of an interest in litigation, the circumstances offering an adequate temptation to do so would almost certainly involve substantial interests sufficient to justify a finding of actual knowledge. But, in the more common cases (like the present one) where the asserted personal interest is slight or even nonexistent, it seems gratuitous to presume that a federal judge, claiming lack of knowledge, actually has that knowledge. Thus, even if the consequences of the Fifth Circuit's rule were less severe, it would be inappropriate to act as though judges are aware of a bias or interest, yet are ignoring the command of Section 455(a). It is all the more inappropriate when the effect of that presumption is to undo perhaps years of proceedings, to the detriment of a party who has secured a final judgment. That sort of result is justified, if at all, only upon a showing that the judge continued to sit despite actual knowledge that he should step aside.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-957

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,

Petitioner

versus

HEALTH SERVICES ACQUISITION CORP.,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May a Court, when presented with facts that would cause a reasonable person to firmly expect a judge to know of grounds requiring his recusal under 28 U.S.C. §455(a), set aside a judgment rendered by him to preserve the impeccability of the judicial system?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-957

JOHN A. LILJEBERG, JR.,
Petitioner

versus

HEALTH SERVICES ACQUISITION CORP.,
Respondent

BRIEF FOR RESPONDENT

The interpretation of 28 U.S.C. §455(a) as applied in this case by the United States Court of Appeals for the Fifth Circuit is workable and flexible. It preserves the impeccability of the judicial system and its "appearance" as legislated by Congress. Furthermore, the ruling by the Fifth Circuit in this case is entirely consistent with the intent and purpose of 28 U.S.C. §455.

STATEMENT OF THE CASE

A suit for declaratory judgment was filed by Health Services Acquisition Corp. ("HSAC") against John A. Liljeberg, Jr. ("Liljeberg"), on November 30, 1981 seeking a judgment declaring HSAC the owner of St. Jude Hospital of Kenner, La., Inc. ("St. Jude"). Trial on the merits was held before the Honorable Robert F. Collins on January 21-22, 1982, and on March 12, 1982, Judge Collins rendered judgment, entered on March 16, 1982, dismissing HSAC's case and declaring Liljeberg the owner of St. Jude. The decision was subsequently affirmed by the Fifth Circuit on October 18, 1982 (App. No. 82-3240), by a 2-1 decision with a vigorous dissent by Circuit Judge Alvin B. Rubin. Petitioner's Appendix H, p. 78a.

On August 17, 1983, HSAC learned that Judge Collins was a member of the Board of Trustees of Loyola University ("Loyola") during the pendency of negotiations between Loyola and defendant Liljeberg for the sale of certain property in the "Monroe Tract" to Liljeberg for the express purpose of building the St. Jude Hospital. The hospital was to be built pursuant to the approval awarded by state and federal agencies in the name of St. Jude under Section 1122 of the Social Security Act (42 U.S.C. §1320a-1). The ownership of St. Jude was the subject of the action heard by Judge Collins and ruled upon by him while he was a member of the Loyola Board. Loyola had a substantial interest in the outcome of the litigation then before Judge Collins because a decision favorable to Liljeberg would result in an approximate $9,000,000 increase in the value of land owned by Loyola adjacent to the property to be sold to Liljeberg if Liljeberg were successful in his efforts to have the adjacent land rezoned to accommodate commercial use. This rezoning was a condition of the purchase agreement between Loyola and Axel Realty, Inc. through John A. Liljeberg, Jr., President

(see Jt. App. 50-58), and was a part of Board discussions as well as negotiations leading up to the purchase agreement.[1]

Shortly after learning that Judge Collins was a member of the Board of Loyola, HSAC filed a motion to vacate the March 1982 judgment on the grounds that Judge Collins should have disqualified himself under 28 U.S.C. §455(a) and (b). Judge Collins denied the motion and declined to vacate his judgment. HSAC appealed to the Fifth Circuit, which remanded the matter to a judge other than Judge Collins, to develop more specific information about Judge Collins' knowledge of Loyola's interest, observing that, "[T]he judiciary must be governed by the appearance, as well as the reality, of disinterested adjudication."

On remand, a hearing based solely on documentary evidence and deposition testimony was held before another district judge. The key evidence supporting that judge's and the Fifth Circuit's finding that Judge Collins had, at a minimum,[2] constructive knowledge of Loyola's interest begins with his membership on the Loyola Board of Trustees, his presence at Loyola Board meetings and his regular receipt of written material about the Board's deliberations and actions. The lower court's findings of fact, which were in large measure adopted by the Fifth Circuit, reveal that Judge Collins was a member of the Loyola Board from 1977 through 1983, before, during and after this litigation. During that time the Board met five times a year. The minutes of each meeting were prepared several weeks after the meeting.

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1. The full ramifications of a result favorable to Liljeberg are explained by the Fifth Circuit. Petitioner's Appendix A, p. 8a.

2. The district court and the Fifth Circuit found that Judge Collins had actual knowledge that he failed to recall. Petitioner's Appendix A, p. 9a and Petitioner's Appendix B, p. 29a, n. 12.

The minutes, along with an agenda for the upcoming meeting and materials relevant to issues to be considered at that meeting, were then mailed to each Board member, including Judge Collins. Thus, all Board members were provided three possible sources of information concerning Board activities and interests – (1) an agenda together with pertinent documents before each meeting; (2) presence at and participation in the meeting; (3) minutes after the meeting.

The disposition of the Monroe Tract, significant portions of which were ultimately sold to Liljeberg conditioned upon his obtaining favorable rezoning of Loyola's adjacent property, was discussed at Board meetings as early as March 1979. The first specific mention of the St. Jude Hospital was made in the minutes of the November 29, 1979 meeting wherein Board members were informed that Loyola representatives had discussed selling Loyola property to a group of developers interested in building St. Jude Hospital. It was also mentioned that the Board wanted to have this property rezoned. Jt. App. 22, 24.

Detailed discussions of the St. Jude Hospital project are reflected in the Minutes of the very next meeting of the Board of Trustees which took place on January 24, 1980, and which, according to the findings of fact made by the district court Judge Collins attended, and at which time he heard the report of the Real Estate Committee wherein the following topics were considered and discussed:

1. The first St. Jude offer to purchase portions of the Monroe Tract made by Liljeberg;

2. The need for a "certificate of need" in order for the hospital to receive Medicare and Medicaid reimbursement;

3. The rejection of the first offer by the Real Estate Committee and correspondence informing Liljeberg of the rejection as well as of the fact that ***"Loyola was desirous of continuing negotiations with St. Jude Properties but, that until a certificate of need were forthcoming, Loyola would more than likely not be interested in the project."*** (emphasis added);

4. The second offer made by the Liljeberg group;

5. The approach made to the then chairman of the Loyola Board, Moise Steeg, by the attorney for St. Jude requesting assistance with the preparation of a prospectus and a public offering to raise funds for the St. Jude Project;

6. Steeg's decision to withdraw his services from the Liljeberg group based upon Steeg's determination that there was a conflict of interest.

The Minutes, which contain four references to Liljeberg as the developer of the St. Jude hospital project, further report a unanimously passed Board motion to refer the second offer made by St. Jude to the Real Estate Committee for further study, and to have St. Jude informed of this action. Jt. App. 25-28.

Not only was it specifically found that the Judge heard this report but the district court determined ". . . that due to Judge Collins' attendance at the meetings in which the sale to Liljeberg was discussed, ***he had actual knowledge of***

Loyola's potential interest at the time of those meetings, on January 24, 1980 and September 25, 1981, both of which occurred prior to this litigation." Petitioner's Appendix B, p. 29a, n.12. (emphasis added).

Thus, even before the lawsuit was filed and allotted to Judge Collins, he had been informed of Loyola's interest in continuing negotiations with Liljeberg and of the importance of securing a certificate of need to Loyola's decision on proceeding with the project.

It was further found that at the March 6, 1980 meeting of the Loyola University Board of Trustees, the Real Estate Committee and the President's Council Real Estate Committee reported their recommendation to the Board that it reject the then most recent offer made by St. Jude Properties, and that all negotiations relative to this particular project be terminated. Contained in the report was a summary of the offer as well as the observation that the group spearheaded by Liljeberg had not [at that time] obtained a certificate of need. Although Judge Collins was not present at the meeting, based on the findings of the district court that the Judge customarily read previous Board minutes before the next meeting, a reasonable person would deduce that he read this report.

After a lull in the negotiations with St. Jude and Liljeberg, during which time several other proposals were considered, activity resumed on September 25, 1981, when the Real Estate Committee reported to the Board that a new hospital had been approved for the Kenner area by the State. Note is made in the report that the group receiving the approval was not HCA, which had previously submitted a §1122 application. The district court specifically found that Judge Collins had actual knowledge, albeit subsequently forgotten, of Loyola's interest by virtue of his attendance at this meeting. Petitioner's Appendix B, p. 29a, n.12.

On or about October 29, 1981, the Board was advised of "renewed activity regarding construction of a hospital on the Monroe Tract in a document entitled 'Real Estate Matters'. . . for their consideration at the November 12, 1981 Board meeting." This document also identified Loyola's property as a prime location for such a project. At the very next meeting held on November 12, 1981, some two weeks before the filing of the lawsuit and its allotment to Judge Collins, the entire Board, including Judge Collins, was informed that a hospital in the vicinity of Loyola's land could be a significant investment factor, if the development of the hospital and surrounding acreage were kept under control. Upon recommendation of the Real Estate Committee, the Board unanimously approved a resolution calling for the resumption of negotiations with the St. Jude group. Pet. App. B, p. 21a.

It should be noted that a verbatim copy of this resolution authorizing Loyola's continued negotiations with the developers of the St. Jude Hospital was sent to all Board members in advance of the November 12, 1981 meeting. Jt. App. 73.

The connection between the rezoning of Loyola's land and the St. Jude Project was discussed with the Board. It was made clear to the Board that the rezoning of Loyola's land was a condition of sale to Liljeberg. This condition was specifically noted by the district and appellate courts, as was the fact of Judge Collins' presence at this critical meeting.

The January 28, 1982 Minutes of the Loyola University Board of Trustees contained explicit discussion of the St. Jude Hospital Project. Jt. App. 36. The contents of these Minutes inescapably demonstrated Loyola's substantial connection to and interest in the pending litigation:

> "Regarding the negotiations with the St. Jude Hospital Corporation, Mr. Eckholdt [Loyola's

> Vice President of Business and Finance] reported that the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation. If negotiations are brought to a satisfactory conclusion, there is a great likelihood that there will be a major hospital built on the university's property. . ."

These Minutes were mailed on March 12, 1982 which was also the day Judge Collins signed the Judgment in favor of Liljeberg.

The report of the March 11, 1982 Executive Committee meeting, mailed to the Board on March 15, 1982, contains a detailed discussion of the terms of the sale of the Monroe Tract property to Liljeberg, including reference to the requirement that Liljeberg secure the rezoning of Loyola's adjacent property. Jt. App. 74.

The district court on remand and the Fifth Circuit Court of Appeals further found that Judge Collins did not reacquire actual knowledge of Loyola's interest until March 24, 1982, at the time he reviewed material that had been sent to him in preparation for the March 25 meeting. Judge Collins controlled the outcome of the case until March 26, 1982 (10 days after the March 16, 1982 entry of judgment.) *See*, Fed.R.Civ.P. 52, 59; Petitioner's Appendix B., p. 32a.

On March 25, 1982 Judge Collins is reported as present at a Board meeting where the details of the agreement between Loyola and Liljeberg were presented by the Executive Committee as well as the Real Estate Committee.

Moise Steeg, an attorney and Chairman of the Board of Trustees of Loyola University during the pertinent period, confirmed the Loyola Board procedures. He described Judge Collins as an active and interested Board member. Steeg testified that the sale and management of the Monroe Tract were important financial matters for Loyola, discussed throughout the time Judge Collins was a member of the Board. Steeg further testified that he "[didn't] think there was anyone on the board who was not aware of the St. Jude offer," and that all Board members are rather attentive about matters of finances or disposition of real estate. Steeg also stated that he had been approached to represent Liljeberg in negotiations to purchase the Loyola land and had reported this to the Board. *See*, Jt. App. 84-90.

In sum, well before the March 24, 1982 date of actual (remembered) knowledge found by the district court, and well before the execution of the Agreement to Purchase, Judge Collins had actual (but forgotten) knowledge of Loyola's interest in entering into a purchase agreement with Liljeberg, its interest in Liljeberg's obtaining §1122 approval, its interest in obtaining rezoning of surrounding property through Liljeberg's efforts, and the positive financial effect that this would have on Loyola's property. A reasonable person would be safe in concluding that the Judge voted to resume negotiations with the Liljeberg interests. Moreover, he had been informed that HCA was not the owner of the §1122 approval. The ownership of the corporation holding this approval was ***the*** issue in the case which was brought by HCA's subsidiary and heard by him only four months after he reacquired actual (but forgotten) knowledge on September 25, 1981.

SUMMARY OF ARGUMENT

Petitioner's policy concerns are only remotely related to the particular facts and issues of this case. Petitioner's contention that litigants and the judicial system itself would suffer by virtue of the Fifth Circuit's decision to vacate a tainted judgment flies in the face of the appellate court's carefully-worded opinion and the rigorous standards set forth therein for interpreting 28 U.S.C. §455(a).

The matter before this Court indeed concerns policy, but the policy at issue is that of ensuring the integrity of the judicial system despite rare, potentially adverse effects on a successful litigant. Pursuant to §455(a), even the appearance of impropriety, as seen through the objective eyes of the reasonable person, requires recusal. In light of this statutory purpose, the Fifth Circuit refused to be satisfied by a less stringent standard of judicial conduct, and correctly vacated a judgment where an objective observer would firmly expect the judge to have known information to which he had been recently exposed on numerous occasions.

Moreover, this is not solely a case involving an "appearance of impropriety," because Judge Collins' conduct violated the express mandate of §455(b)(4) as well. According to Petitioner, this provision is designed to guard against actual bias, interest or impropriety, and thus even Petitioner's argument leads to the inexorable conclusion that the judgment rendered by Judge Collins should have been vacated.

ARGUMENT

I.

PETITIONER'S POLICY ARGUMENTS DEPEND UPON UNREASONABLE EXTENSIONS OF THE FIFTH CIRCUIT OPINION.

In enumerating all the possible adverse consequences that could ensue from the Fifth Circuit's opinion, Petitioner fails to acknowledge the safeguards built into the decision which prevent the opening of the floodgates he predicts.[3] First, the Fifth Circuit decision will only affect the finality of those judgments rendered by a judge where an objective observer would ***firmly expect*** that he had actual knowledge of interest in the case.[4] The Fifth Circuit, acknowledging the harsh consequences that can result from post-judgment motions to vacate based upon recusal grounds, emphasized that knowledge of facts requiring recusal should not be lightly imputed to a judge.

> "Where a reasonable person would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist."
> Petitioner's Appendix A, p. 12a.

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3. Petitioner even concedes that the Fifth Circuit imposes a timeliness requirement on motions brought on §455(a) grounds, but does not mention the fact that such a requirement minimizes the risk of a dissatisfied litigant abusing §455(a) to obtain a "second bite at the apple."

4. Indeed, the Fifth Circuit found that Judge Collins had actual knowledge of Loyola's interest on January 24, 1980 and September 25, 1981, albeit forgotten, and on March 24, 1982. This is not, therefore, a case where the judge had no knowledge of interest.

Accordingly, the type of constructive knowledge required before the limited rule of the Fifth Circuit will be applied is not that which represents a value judgment about what a person of a certain age and with a certain educational background should know, as one might expect in a tort action. Rather its rule contemplates a situation in which a reasonable person is unable to come forward with a plausible and objectively ascertainable explanation for lack of knowledge, in light of specific facts and circumstances militating in favor of a finding of actual knowledge.

Petitioner asserts that the theory of constructive knowledge adopted by the Fifth Circuit stretches §455(a) "past the breaking point, effectively requiring a judge to recuse himself *sua sponte* based on facts that he does not know." This specious formulation is typical of Petitioner's analysis of the Fifth Circuit opinion where all possibilities are taken to their extreme, omitting mitigating variables that necessarily must figure into any reasoned equation. The actual effect of the Fifth Circuit decision is to require judges to be even more diligent about informing themselves of their own interests. Moreover, this decision does not stand for the proposition that judges must perform the impossible, but rather serves as important precedent for the sound policy that if a judge is frequently exposed to written and oral communications about which he has a judicial and fiduciary duty to know, under circumstances in which the reasonable observer would firmly expect him to retain this knowledge, any judgment rendered by him related to this knowledge risks being set aside.

Clearly, constructive knowledge in its broadest sense can be found in many different situations. However, the Fifth Circuit definition applies only to rare occurrences. If, under the carefully delineated rule adopted by the appellate court, constructive knowledge did not require recusal and vacation

of judgment, the entire judicial system would be turned on its head, holding judges to the lowest standard of conduct, excusable by their use of the simple phrase: "I didn't know".

In further considering the effects of the Fifth Circuit's ruling, Petitioner maintains that the decision "introduces a capriciousness to judicial actions that disserves judges and litigants alike." The thought underlying this assertion is that litigants and judges could not be certain of the finality of their judgments because dissatisfied litigants would flock to the Clerk's Office with groundless motions to recuse and vacate. But, this is not a realistic scenario. Lawyers intending to continue practice in the particular district would be most reluctant to bring a motion to recuse or vacate unless such pleadings were supported by extremely sound grounds. Lawyers who did not fear the damage to their professional reputations which would result from frivolous motions to recuse or vacate would have their boldness curbed by the specter of Rule 11 sanctions.[5] Most importantly, however, Petitioner's fear that the Fifth Circuit's rule requiring recusal in circumstances where there is a clear appearance of impropriety would lead to an *en masse* rush to the courthouse by disgruntled parties has already proved itself to be unfounded.

The Fifth Circuit's experience with the challenged rule is the best evidence that it does not lead to the adverse consequences described by Petitioner. In *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976), see discussion *infra*, the Fifth Circuit handed down a celebrated decision announcing its vacating of a judgment where there was a "mere" appearance of impropriety, as characterized by Petitioner. If this rule had

5. For a discussion of the practical considerations affecting a lawyer's decision to seek disqualification, see Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. Kan. L. Rev. 255, 256-257 (1980).

indeed opened the Pandora's Box foreseen by Petitioner, the Fifth Circuit would surely have discovered it in the ten years since the much heralded *Brown* decision, and might have been more inclined to adopt the position advocated by Liljeberg. However, as amply demonstrated by *HSAC v. Liljeberg*, the Fifth Circuit has unswervingly adhered to its previously articulated rule.

A review of the reported cases arising out of the states which currently comprise the Fifth Circuit reveals a total of thirty-eight (38) cases in which the issue of judicial disqualification was raised since 1976. Those thirty-eight (38) cases arise under 28 U.S.C. §§ 144, 455(a), 455(b) or due process grounds. In thirty-one (31), the Fifth Circuit found that recusal was not required. In only seven (7) cases the Fifth Circuit held that the circumstances required recusal. These figures illustrate several points. First, they show how few times the issue of judicial disqualification is raised and what a small percentage of cases they constitute. During the period 1983 through April, 1987, some 17,500 matters were filed in the Fifth Circuit, yet only thirty-eight (38) matters in over ten years involved judicial disqualification, even as only one of many issues. Second, they show how few times an alleged problem of judicial disqualification will be successfully urged. These figures lay to rest Petitioner's contention that the Fifth Circuit's holding will lead to a parade of horribles.

The rule enunciated by the Fifth Circuit in the instant case is not so very different from the rule in *United States v. Brown, supra*, enunciated in 1976, and the circumstances themselves are not dissimilar insofar as they relate to credible evidence calling into question the testimony of the judge.

Finally, although finality of judgments is a major concern in the sound administration of justice, it is not the ultimate goal as is best shown by the adoption of Rule 60 of the

Federal Rules of Civil Procedure. The existence of Rule 60 is clear evidence of the fact that Congress and this Court have determined that some judgments should not stand.

II.

PETITIONER'S ALLEGED HARM DOES NOT JUSTIFY EROSION OF 28 U.S.C. §455(a).

Nearly a century ago, this Court recognized that no suspicion that the administration of justice has been interfered with can be tolerated. *Mattox v. United States*, 146 U.S. 140, 149 (1892). The judicial disqualification statute is designed to maintain the unassailable sanctity of the judiciary, the importance of which was expressly recognized in *Mattox*, and to promote public confidence in the impartiality and trustworthiness of those who sit on the federal bench.

28 U.S.C. §455 enacts into law Canon 3C. of the Code of Judicial Conduct. Canon 3(C)(1) provides for disqualification where a judge's impartiality might reasonably be doubted:

> "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ."

The Canon then goes on to specify particular instances in which a judge should disqualify himself. The language of Canon 3C. is virtually identical to the language of 28 U.S.C. §455.

The test adopted in the Code seeks to guarantee not only that a biased judge will not participate but that no reasonable person will ***suspect*** as much; the ***appearance*** of impartiality throughout the judiciary is the overriding goal. Any conduct

that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. The fact that the Code adopts the standard of a reasonable man knowing all the facts does not reduce the emphasis on appearance. Hidden facts indicating partiality may at any time come into public view and therefore are legitimate elements of an appearance test. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 (1973).

The necessity of maintaining public confidence in the integrity of the judiciary and hence the judicial process compelled adoption of the appearance test. Many courts have recognized that disqualification may be required not only by a desire to ensure fairness to the parties in the case, but also by "a circumspect and punctilious devotion to the ideal of justice in the abstract as it appears to the public at large." *Id.* at 746 (quoting *United States v. Zarowitz*, 326 F. Supp. 90, 92 (C.D. Cal. 1971).) The explanation for this concern lies in the peculiar nature of the judicial process. As Justice Frankfurter observed in *Baker v. Carr*, 369 U.S. 186, 267 (1962), courts possess "neither the purse nor the sword." Their authority rests ultimately on public acceptability of judicial decisionmaking. That acceptability depends in turn on a belief in the impersonality and reasoned foundation of judicial decisions. Such a belief is, of course, undermined when judicial decisions may be closely identified with the interests of the decisionmakers themselves. 86 Harv. L. Rev. at 746-747.

Justice Frankfurter, in his analysis of his disqualification in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), explained the importance of assiduously maintaining the appearance of impartiality as well as impartiality in fact:

> "There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Commission v. Pollack*, 343 U.S. at 466-467.

Petitioner has attempted to deflect this Court's focus from the policy underlying §455(a) to the alleged harm that he will sustain unless the Fifth Circuit's decision is overturned. The correct analysis would be to balance the interest of all litigants and the public at large in a reliable, trustworthy and untainted judiciary against the very limited scenario in which an individual litigant could possibly be harmed by the Fifth Circuit holding. Furthermore, Petitioner has developed a policy argument that is not grounded in the facts of this particular case. The harm that Liljeberg contends he will suffer unless the Fifth Circuit holding is reversed, is in reality a direct consequence of the following actions taken at his own peril.

On March 19, 1982, a mere three days after entry of Judge Collins' March 12, 1982 judgment and before the delays for new trial had even run, Liljeberg, as president of Axel Realty, Inc., entered into a purchase agreement with Loyola University for the purchase of 81 acres of land for over $7,000,000 for the building of St. Jude Hospital. (The sale of this property by Loyola to St. Jude took place on March 15, 1983). Liljeberg also admits in his appellate brief submitted in connection with *Health Services Acquisition Corp. v. Liljeberg*, 691 F.2d 500 (5th Cir. 1982) (unpublished opinion), that he introduced ordinances before the Kenner City Council to have the land zoned for hospital purposes. On July 16, 1982, a solicitation letter, questionnaire and pamphlet were sent to a large number of physicians practicing in the vicinity in which Liljeberg intended to build, concerning "The St. Jude Hospital Complex of Kenner, conceived and developed by Mr. John Liljeberg." Furthermore, at the time of the Kenner City Council rezoning hearing, HSAC advised the Kenner City Council by letter that an appeal was pending over the ownership of the St. Jude corporation. HSAC further asserted in its letter its right to the §1122 approval and its intent to judicially contest any assertion to the contrary. Liljeberg not only was aware of HSAC's position, but also attached a copy of its letter to his Fifth Circuit brief on the merits. All these steps were taken by Liljeberg even prior to the hearing before the Fifth Circuit on the merits of the case. Thus, his claims of detrimental reliance on a final judgment are not well-founded as his actions to build a hospital proceeded without any apparent regard to HSAC's appeal. Furthermore, the judgment entered by the Fifth Circuit on October 18, 1982, did not become final until the time for application to the Supreme

Court had run on January 16, 1983. Within two weeks, HSAC filed suit against St. Jude and governmental authorities contesting the validity of the issuance of the §1122 approval to St. Jude. That suit is still pending. Thus any actions taken by Liljeberg were done while appeal rights on the first suit were pending or while a second suit was pending related to the §1122 approval, except for an approximate two-week period. His claim of detrimental reliance on the judgment is belied by the facts.

Liljeberg's determination to move as quickly as possible with the building of a hospital was not apparently affected by judicial developments. He proceeded from the beginning as if there were no serious contest as to the ownership of St. Jude. The harm he claims, therefore, is not the result of the vacating of a tainted judgment upon which he allegedly relied to his detriment, for he was on notice at all pertinent times of HSAC's claims to the corporation and the certificate of §1122 approval issued in the name of St. Jude.

The vacation of the judgment rendered by Judge Collins will neither cause the magnitude of harm described by Petitioner nor constitute the sole cause of harm for which Petitioner himself must claim a large measure of responsibility. Additionally, of course, an order setting aside Judge Collins' judgment would only require that HSAC's claims be retried; it would not adjudge Petitioner's rights on the merits of such a lawsuit.

III.

HSAC'S RULE 60(b)(6) MOTION WAS TIMELY.

The timeliness of a Rule 60(b)(6) motion is determined pursuant to a rule of reasonableness:

> "The motion shall be made ***within a reasonable time***, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). (emphasis added).

Furthermore, no language in Section 455 even remotely suggests that a Rule 60(b)(6) motion to vacate brought on disqualification grounds represents an exception to the timeliness requirements of Rule 60(b)(6). Thus, the Fifth Circuit correctly held that HSAC's motion to vacate was timely brought because it was brought immediately upon discovery of the existence of the grounds therefor. *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (the law is well settled that one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for disqualification); *Satterfield v. Edenton-Chowan Board of Education*, 530 F.2d 567, 574-575 (4th Cir. 1975). That the facts which cast a shadow on the appearance of judicial impartiality are not learned until after a judgment, renders that judgment no less tarnished.

Nonetheless, Petitioner proposes fixed deadlines for bringing motions to vacate pursuant to Rule 60(b)(6) and recommends that such relief sought on Section 455 grounds should no longer be available once proceedings on appeal have been concluded. Petitioner relies on selected references to the legislative history of Section 455(a) as support for his proposed cutoff. However, Section 455 as adopted by Congress is conspicuously silent as to procedure and time limitations.

Indeed, notwithstanding recommendations by the Department of Justice, Congress declined to include any time limits whatsoever in §455. *See, SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). Furthermore, the time limits contemplated by the Department of Justice were intended to remedy a perceived evil that simply does not exist in this case – "to prevent applications for disqualification from being filed near the end of trial when the underlying facts were known long before." H.R. Rep. No. 1453, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6358. In this case, HSAC sought relief as soon as it learned of Judge Collins' membership on the Loyola University Board of Trustees, and accordingly, fulfilled its obligation to timely act pursuant to statutory law and jurisprudence.

Petitioner's suggestion that HSAC's motion was not timely because it was not brought before the conclusion of appellate proceedings is particularly unjustifiable in light of the judge's silence and inaction subsequent to his admitted knowledge of his conflict. In this case, there is absolutely no doubt that on March 24, 1982, at the latest, the judge became actively aware of the disqualification grounds, but failed to fulfill his duty to disclose this information to the parties to the litigation. His abrogation of this duty prevented HSAC from raising the disqualification and vacation issues prior to the finality of judgment in the district court, and certainly well before the initiation of appeal proceedings. Denial of HSAC's

motion to vacate because of the judge's failure to bring his conflict to the attention of the parties so that the motion could have been brought in what Petitioner deems to be a "timely fashion" would be patently arbitrary and unjust.

Petitioner further berates HSAC for first bringing the motion in August of 1983 by suggesting that a review of public records, and more particularly the financial disclosure statement filed by Judge Collins in May of 1981, would have revealed the judge's membership on the Board of Trustees of Loyola University.[6] Petitioner neglects to mention, however, that the negotiations between Liljeberg and Loyola were not matters of public record at the time the suit was filed, allocated to Judge Collins and decided in Liljeberg's favor, so that learning of Judge Collins' membership on the Loyola Board would have been meaningless.

If, indeed, there were an obligation to examine the financial disclosure statement of Judge Collins, the obligation would fall on ***both*** parties, not just HSAC, together with a concomitant obligation of making the facts known to the court and opposing counsel. At the time of trial, Petitioner had been negotiating with Loyola for two years. If there were a duty to know what the financial statement discloses, it goes without saying that Petitioner would have appreciated the significance of such information.

When viewed in this light, the facts become significantly different from those presented by Petitioner. In truth, the Judge and Petitioner were in much better position than HSAC to know of and disclose the disqualification grounds

6. The parties to an action do not have the obligation to ferret out the interests of the presiding judge, and it is absurd to suggest all counsel have a duty to examine the financial disclosure forms of every judge before whom they appear.

in accordance with Petitioner's conception of timeliness, but they failed to do so. Under such circumstances, it would be patently unfair to penalize HSAC for its alleged failure to "timely" discover the Judge Collins–Loyola–Liljeberg relationship.

Next, Petitioner seizes upon excerpts from the congressional debate on Section 455 and argues by analogy that the time delays for attacking subject matter jurisdiction should be applied to Section 455, and thus the latter may not be brought after the conclusion of direct appeals. Petitioner's strained argument starts off with the proposition that Congress intended the rule regarding the time limit for raising judicial disqualification to be the same as that which controls the time within which to challenge subject matter jurisdiction. Section 455 contains no such time limitations, and the issue of the timeliness of a motion to recuse is not before the Court. Rather, the issue before this Court is the timeliness of Respondent's motion to vacate pursuant to Rule 60(b)(6), and Respondent respectfully suggests that the obvious source of law governing the timeliness of such a motion is the Rule itself. *See*, *United States v. 119.67 Acres of Land*, 663 F.2d 1328 (5th Cir. 1981) (motion to vacate under Rule 60(b)(6) was timely when brought four years after entry of judgment where mover was not previously aware of grounds therefor.)

Further, Petitioner's perception that the possibility of challenging subject matter jurisdiction dies at the conclusion of an appeal is not based on any hard and fast rule. Rather, there is sound authority for the proposition that if a court lacked jurisdiction of the subject matter, its judgment is void and is susceptible of attack under Rule 60(b)(4) within a reasonable time. *See*, Annot., 59 A.L.R. Fed. 831, 853 (1982). For example, in *Watts v. Pinckney*, 752 F.2d 406 (9th Cir. 1985), the Wattses filed a diversity action against

Pinckney in November of 1976. In July of 1980, the district court entered judgment in favor of the Wattses and Pinckney did not appeal and paid the Wattses the full amount awarded by the Court. In June of 1983, Pinckney filed a motion pursuant to Rule 60(b)(4) in which he requested that the judgment against him be vacated as void. The district court granted the motion to vacate and the plaintiffs appealed. The Ninth Circuit determined that the original judgment against Pinckney was invalid for lack of subject matter jurisdiction, having found that the plaintiffs' claim was exclusively within admiralty jurisdiction and that their remedy was solely against the United States. The Ninth Circuit reasoned that since there had been a total lack of jurisdiction of the claim against Pinckney, the judgment was void and restitution was proper. The appellate court further determined that the Wattses' allegation of *res judicata* precluding a collateral attack was not applicable because *res judicata* only bars a ***collateral*** attack on a final judgment, not a ***direct one*** brought pursuant to Rule 60(b):

> "A direct attack on a judicial proceeding is an attempt to correct it, or void it, in some manner provided by law to accomplish that object. It is an attack . . . by appropriate proceedings between the parties to it seeking, for sufficient cause alleged, to have it annulled, reversed, vacated or declared void. . ." (citations omitted).

It is clear that as a general rule, final judgments are not subject to ***collateral*** attack, insofar as the issue of jurisdiction over the subject matter is concerned. However, the law is certainly not that clear-cut where ***direct*** attacks[7] are concerned:

7. See "direct attack" in Black's Law Dictionary 413 (5th ed. 1979). See also "collateral attack" in Black's Law Dictionary 237 (5th ed. 1979).

> "So-called quasi-jurisdictional facts are not a part of jurisdiction over the subject matter, and the lack thereof will not afford the basis for a collateral attack upon a judgment rendered by the Courts which we are discussing. Therefore, a judgment of a federal court is not void, and is not subject to collateral attack on the ground that the rendering court lacked federal jurisdiction, ***although the judgment is subject to direct attack on that ground.***" 7 Moore's Federal Practice ¶ 60.25[2] (1985). (emphasis added).

The Ninth Circuit's decision in *Watts* is not the only authority for the proposition that a Rule 60(b)(6) motion is a direct attack on a judgment, for precisely the same view is echoed in 7 Moore's Federal Practice ¶ 60.25[2] (1985):

"The following are methods of direct attack upon a federal district court judgment rendered in a civil action that is subject to the Federal Rules:

> (b) by motion for new trial under Rule 59 or for relief under related rules; by appeal; by motion for relief on one or more grounds stated in clauses (1), (2), (3), (5) and (6) [of Rule 60(b)], which motion invokes the discretion of the district court and cannot be used as a mere substitute for appeal; by motion under power reserved to the court by Rule 60(b) . . ."

The lengthy colloquy cited by Petitioner discloses congressional concern with the possibility of ***collateral*** attack, not ***direct*** attack. A motion brought pursuant to Rule 60(b) is clearly not a collateral attack, and Petitioner's attenuated argument collapses under its own weight.

Unable to evade the explicit time provisions in Rule 60(b)(6), Petitioner is forced to argue that this is not an unusual or exceptional case, and thus the judgment rendered is not susceptible of vacation. Petitioner's willingness to blithely dismiss the action currently pending before this Court as an ordinary action is disturbing, for its ramifications insofar as the integrity of the judicial system is concerned are profound.

Two different panels of the Fifth Circuit were unwilling to treat the issue of judicial integrity in the cavalier manner suggested by Petitioner, and both found that the facts of this case aroused sufficient suspicion to warrant further inquiry and relief. The Fifth Circuit found as a fact that an appearance of impropriety existed. Petitioner's Appendix A, p. 1a. Evidently the facts were sufficiently unusual to prompt the Fifth Circuit to ultimately afford relief it generally does not grant. See p. 14 herein. Clearly the Fifth Circuit views the granting of disqualification motions as an exception rather than the rule, and the fact that the Court felt compelled to vacate the judgment rendered by Judge Collins is further evidence of the exceptional nature of the circumstances involved in this case.

Petitioner further argues that HSAC has failed to demonstrate the requisite hardship or injury to warrant vacation of judgment under Rule 60(b)(6). Petitioner fails to take into account the significance of damage to public confidence in the judicial system. Petitioner admits that by design, the benefit of Section 455(a) was to accrue to the judicial system

as a whole, and not to the parties to the lawsuit, and further concedes that the injury caused by failure to grant recusal under Section 455(a) is primarily, if not totally, to the judicial system itself. Nonetheless, Petitioner concludes that such harm to the judicial system as the statute was designed to prevent is slight when compared to "the real injustice to the successful litigant." According to Petitioner's proposed balancing test, concern about the "real injustice to the successful litigant" should outweigh "concern about an appearance of the injustice to the unsuccessful one." However, the harm resulting from the appearance of injustice is not to be measured from the perspective of the "unsuccessful litigant". Section 455(a) was designed to protect and strengthen the judicial system as a whole, a fact recognized by Petitioner. Petitioner's position that concern for the integrity of the judicial system should give way to concern for the interests of the "successful litigant" is patently illogical, given the purpose of the statute.

IV.

THE PURPOSE OF THE REASONABLE MAN STANDARD IS UNDERMINED BY PETITIONER'S ARGUMENT.

An attorney or party-litigant should not be placed in the position of having to probe into the presiding judge's state of mind, memory, forgetfulness, and credibility. Yet, this is precisely what is called for by Petitioner's reading of §455. According to Petitioner's formulation of the recusal law, a litigant must be able to prove, in accordance with an unarticulated standard of proof, that a judge is actually biased or partial or has actual knowledge of his interest. How is this to be done? Does one call upon character witnesses to testify as to the judge's veracity? Does one subpoena the judge's personal files and records? Does one subpoena eye witnesses?

What happens in the rare event that the judge's personal files and records conflict with his testimony as to his state of mind?

If proof must be had of actual bias or actual knowledge of interest, an attorney or litigant will find himself in the position of putting the judge on trial. For this reason, a reasonable man standard has been interposed between the judge and a party-litigant which insulates both from the above-described predicament.

Furthermore, Petitioner's argument is circuitous, for one can only know whether there is actual bias or actual knowledge of interest when evidence is adduced thereon and a decision is made based upon the proof. This proof would in all likelihood include but not be limited to the judge's testimony. Nonetheless, Petitioner would constrain the reasonable man to accept the truth based solely on the individual judge's testimony as to his state of mind. If such blanket acceptance of testimony were mandated, it would eviscerate the reasonable man standard. All that would be required would be to ask the judge, "What did you know?" or "Were you biased?" There would be no reasonable man analysis, for one would be bound to accept the judge's testimony at face value and without question.

The reasonable man standard wisely does away with both of these untenable situations—one where a litigant is forced to put on trial a judge's veracity and one in which a litigant is bound to blindly accept the judge's word. The reasonable man standard bridges these two extremes and provides a standard for resolution of the thorny dilemmas posed by judicial disqualification.

Likewise, the Committee which drafted the Code of Judicial Conduct recognized that the required appearance of impartiality to the public might not always coincide with a judge's declared actions and attitude. Accordingly, the Committee, in considering ways in which a judge might protect himself from disqualification, rejected the blind trust concept for several reasons including its overriding concern with public confidence:

> "Most important was the doubt that the public and litigants would believe that the trust was blind if after a decision the fact was disclosed that the judge had had a substantial blind trust interest in the winning party in a proceeding before him." Thode, *Reporter's Notes to the ABA Code of Judicial Conduct* 64-65 (1973).

In this case, for instance, in light of all the evidence suggesting knowledge at the time of trial, a reasonable man would have expected Judge Collins to recall some facts pertaining to the connection between Loyola and Liljeberg, and to inquire as to the nature of the connection and the Fifth Circuit so found:

> "Judge Collins attended a number of meetings in which Loyola's negotiations with Liljeberg and St. Jude were discussed. These meetings took place as late as November 1981, just two months before the trial. Furthermore, Judge Collins was sent written material which clearly disclosed Loyola's interest in the litigation. At the very least, a reasonable observer would expect that Judge Collins would remember that Loyola had had some dealings with Liljeberg and St. Jude and seek to ascertain

> the nature of these dealings." Petitioner's Appendix A, pp. 12a-13a.

A reasonable person would be at a loss to explain why a judge who is legally bound to know of his own interests would fail to recall information to which he had been recently exposed on a number of occasions, and of which he as a fiduciary of an organization should be aware.

Furthermore, a reasonable person would, in all likelihood, wonder about the effect, if any, of the judge's prior knowledge of the relationship between Liljeberg and Loyola and his continued exposure to this information upon his perceptions and cognitive processes. As Justice Frankfurter recognized, one's perceptions are frequently subconsciously colored by information and experiences of which one is not actively aware. *See, Public Utilities Commission v. Pollack*, 343 U.S. at 466-467.

A reasonable person would also question why Judge Collins remained silent on March 24, 1982, when he obtained "actual knowledge" of Loyola's interest in the litigation. The claim that the judge's knowledge had no impact on the judgment is of no moment, for the concept of harmless error has no applicability to recusal issues. 13 C. Wright, A. M. Miller and E. Cooper, *Federal Practice and Procedure* §3553 (1975). Additionally, Judge Collins' failure to disclose his interest upon gaining actual knowledge is not justified by the suggestion that HSAC would only have been accorded the right to make potentially futile post-trial motions before a different judge. In fact, at that time, if Judge Collins had disclosed the information that HSAC learned subsequently from another source, HSAC could have immediately brought a Rule 60(b)(6) motion. The timeliness issue raised by Liljeberg would have been nonexistent. Moreover, Liljeberg would have been on immediate notice as to the existence of

serious problems with the judgment. Most importantly, if the Rule 60(b)(6) motion had been brought at that time, the merits of the case and Judge Collins' denial of the motion to vacate would likely have been heard together on appeal. The joinder of the case on the merits and the recusal issue might well have affected the appellate court's view of the factual determinations reached by the lower court where the credibility of witnesses was such a crucial issue. *See, State of Idaho v. Freeman*, 507 F.Supp. 706, 728 (D. Idaho 1981).

The endless chain of "what if" questions raised by Judge Collins' continued participation in this case, and his silence on learning of his interest, further infect the judgment in the eyes of the reasonable man. Indeed, a reasonable person might believe the judge's silence on March 24, 1982 itself constituted an impropriety. As the Fifth Circuit found:

> "[t]here can be no doubt that Judge Collins should have recused himself on March 24 and immediately informed the parties of his recusal and the reasons for it."
> Petitioner's Appendix A, p. 9a.

Petitioner argues vigorously that a judgment should be set aside retsoactively from the time of a motion to recuse only where there has been actual bias or actual impropriety. For this proposition, Petitioner relies on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986), but he fails to consider the significance of Footnote 3 at 1539, where the Seventh Circuit casts *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) as a case of actual bias by imputation even though no actual bias on the part of the judge was ever shown:

> "In *Hall*, a magistrate's law clerk accepted employment with plaintiff's law firm and

> thereafter worked on the magistrate's opinion. The clerk also had been a member of the plaintiff class. The court thought this required the magistrate's opinion to be set aside, although no motion was made until after the opinion was released. We think that *Hall* is best understood as a case of actual bias (of the clerk) imputed to the court, not simply as an appearance case."

United States v. Murphy, 768 F.2d at 1539, n.3.

The Seventh Circuit did not express any disagreement with the result reached by the Fifth Circuit, and expressly acknowledged the possibility of imputing bias to the judge under appropriate circumstances, even where no actual bias has been shown. Thus, Petitioner's reading of the Seventh Circuit's rule may very well be more rigid than that which the Seventh Circuit contemplated.

The *Murphy* decision, upon which Petitioner's arguments are based, is too factually dissimilar to lend any guidance to this case. In *Murphy*, the trial judge and chief prosecuting attorney had been friends for years before the trial, a fact well known by Murphy's defense counsel. Subsequent to sentencing, Murphy filed a motion seeking the judge's recusal under §455(a) based on knowledge of a vacation taken by the judge and prosecutor after trial. Given defense counsel's longstanding knowledge of friendship between the judge and the prosecutor, *Murphy* does not speak directly to the situation presented here, namely the bringing of a motion to vacate shortly after a party first learns of a judge's relationship to and interest in a case. The court does, however, offer this guidance as to the proper result to be reached where the parties are not aware of recusal grounds before trial:

> "A judicial impropriety serious enough, and secret enough, to escape everyone's notice before trial probably also would be serious enough to create an actual conflict of interest." *Id.* at 1541.

Consistent with its comments on *Hall* discussed above, the Seventh Circuit once again shows its inclination to impute actual bias in appropriate circumstances. This willingness might well stem from the evidentiary problems inherent in the Seventh Circuit's unworkable rule requiring actual bias or impropriety. Moreover, the notion of imputing bias raises myriad other problems. For example, courts would be forced to distinguish those circumstances which would require such imputation, from those that would not.

Equally problematic is the fact that Petitioner never identifies what constitutes actual bias or actual impropriety, what consequences obtain for the parties and their attorneys in being forced to prove it, and what result is to be reached when many facts and circumstances point in the direction of partiality or impropriety and the testimony of the judge points in the other direction. Petitioner's rigid interpretation of the Seventh Circuit rule is unworkable, in that it pits litigants and their counsel against the judge and places the judge in the untenable position of being the ultimate judge and witness as to his own conduct. Furthermore, other judges reviewing such motions may be loath to say another judge was actually biased or committed an impropriety. Clearly, the reasonable man standard is preferable to these two alternatives.

To avoid such inquiry into the judge's state of mind, §455(b) specifies circumstances that raise irrebuttable presumptions of bias or interest, even where no actual bias or interest might exist. This obviates the need to attempt to

examine the judge's state of mind, and these guideposts of presumed bias or interest cannot be waived by the parties. Where the §455(b) criteria are met, bias or impropriety is imputed, and no proof is required of their existence. Thus, under §455(b)(2) a judge must disqualify himself where he served as a lawyer in private practice in the matter in controversy or where a lawyer with whom he previously practiced served during his association as a lawyer concerning this matter before him. Likewise, a judge is required to recuse himself when he, or his spouse, or a person within the third degree of relationship to either of them or the spouse of such a person is a party to the proceeding or an officer, director or trustee of a party, §455(b)(5)(i). A judge is considered or presumed to be biased under §455(b) if he served in governmental employment and expressed an opinion concerning the merits of the case, §455(b)(3). His recollection *vel non* of having expressed such an opinion is entirely immaterial. Similarly, under §455(b)(5), a judge whose spouse's uncle's spouse is an officer of a party to the suit before the judge is required to recuse himself because the law imputes impropriety or bias in such a situation, and whether it actually exists or not is simply not pertinent.

In these instances, the state of mind of the judge is totally irrelevant, for the law mandates his disqualification solely because of his relationship to the case before him.

According to the line of cases whose reasoning Petitioner espouses, disqualification is required under §455(b) ". . . because of actual or imputed bias." *New York City Development Corp. v. Hart*, 796 F.2d 976, 978 (7th Cir. 1986). Where there is actual or imputed bias, according to the Seventh Circuit, relief is retroactive. *United States v. Murphy*, *supra*. Further according to the Seventh Circuit, disqualification under §455(b) for actual impropriety would require a new hearing or trial, i.e., retroactive relief. *See, United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985).

Petitioner's ready argument that different results should flow in disqualification situations, depending on whether the grounds therefor are §455(a) grounds or §455(b) grounds, fails to take into account that in some instances, there is no substantive difference between the two. As demonstrated by the foregoing examples, actual knowledge on the part of the judge is not required for all §455(b) recusal grounds. Yet, Petitioner's interpretation of the entire statutory scheme is predicated on the erroneous assumption that §455(a) and §455(b) grounds are clearly distinguishable, and the distinctions are outcome-determinative. From this erroneous assumption flows the equally erroneous conclusion that §455(a) requires only prospective recusal whereas §455(b) requires retroactive relief. When viewed with an eye toward substantive analysis rather than convenient, but meaningless categories, the inherent weaknesses in Petitioner's approach become readily apparent.

Other than identifying the fact that §455(a) is not the same section as §455(b), Petitioner can point to no meaningful distinction between the two that should determine the type of relief accorded under each. Petitioner would be hard-pressed to explain why the law should deny retroactive relief under §455(a) in a situation where the judge denies knowledge of a conflict but a reasonable person would firmly expect him to have actual knowledge, but why it should grant retroactive relief under §455(b)(3) or §455(b)(5)(i) irrespective of the judge's actual knowledge. *See*, e.g., *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969); *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980).

V.

EVEN UNDER PETITIONER'S ANALYSIS OF 28 U.S.C. §455, RETROACTIVE RELIEF WAS PROPER.

Petitioner does not address the full ramifications of 28 U.S.C. §455(b)(4) in this case although it was also raised as a ground for vacating the March 1982 judgment. 28 U.S.C. §455(b)(4) mandates disqualification when the judge . . . "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." Judge Collins' relationship to the HSAC-Liljeberg litigation met the criteria for mandatory disqualification under §455(b)(4), yet he did not fulfull the duty specifically imposed upon him by this provision. At a time when Judge Collins controlled the outcome of this litigation, there was (1) knowledge of (2) an interest (3) that could be substantially affected by the outcome of the lawsuit in which Judge Collins was the trier of fact.

Insofar as the criterion of knowledge[8] is concerned, it is

8. §455(a) does not mention "knowledge" at all and §455(b)(4) describes neither the type of knowledge called for nor the consequences of forgotten knowledge. Notice of facts which put a man of ordinary intelligence on inquiry is the equivalent of knowledge of all facts that a reasonable inquiry would disclose. *Chevron Oil Company v. Tlapek*, 265 F.Supp. 598 (W.D. Ark., El Dorado Div. 1967). Further, failure to recall facts which may give the appearance of partiality or impropriety should not relieve a judge of the burden of knowledge of those facts. *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710, 711 (N.D. Miss., Greenville Div. 1983); *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978).

indisputable that on January 24, 1980, and September 25, 1981, Judge Collins knew of Loyola's interest in and connection to the litigation, although later forgetting this interest. The lower court found that ". . . due to Judge Collins' attendance at the meetings in which the sale to Liljeberg was discussed, he had actual knowledge of Loyola's potential interest at the time of those meetings, on January 24, 1980, and September 25, 1981, both of which occurred prior to this litigation." Petitioner's App. B, p. 29a. The judge's recollection, moreover, was successfully refreshed not later than March 24, 1982, and at that time he actually knew of Loyola's interest in the ultimate outcome of the bench trial over which he had presided.

Loyola's continuing interest[9] in the litigation, the second criterion of §455(b)(4), is also met. In this regard, Petitioner fails to mention the significance of the Fifth Circuit's determination that Loyola's expressly stated interests—construction of a hospital on the property to be sold and the favorable rezoning of Loyola's adjacent property—were inextricably linked to the ultimate outcome of the HSAC-Liljeberg litigation:

9. The first panel of the Fifth Circuit determined that Judge Collins' interest was an "other interest" rather than a "financial interest" under §455(b)(4). The basis for this determination was the exception to the definition of "financial interest" provided for in §455(d)(4)(ii). Pet. App. E, p. 44a. The second panel of the Fifth Circuit "accept[ed] [this] conclusion . . . without analysis of its validity or precedential effect." Pet. App. A, p. 6a, n.1. The second panel's reluctance to adopt the conclusion that Judge Collins' interest was *solely* an "other interest" most probably stems from the fact that the §455(d)(4)(ii) exemption does not apply to this case. Securities held by Loyola University were not at issue, and §455(d)(4)(ii) applies only to "securities" held by an educational, religious, charitable, fraternal, or civic organization. Thus, Judge Collins' interest should be regarded as a "financial interest" under §455(b)(4) as well.

"Although the agreement between Loyola and Liljeberg was not contingent on the outcome of the lawsuit, as a practical matter Loyola still had a substantial interest in Liljeberg's obtaining the certificate of approval. Without the certificate, it is very likely that Liljeberg would not have been able to build the hospital on the Monroe Tract. Construction of a hospital on its property was extremely important to Loyola as shown by the fact that Loyola was allowed under its agreement with Liljeberg to repurchase the land if a hospital was not built. Furthermore, the construction of a hospital on the Monroe Tract was critical to the effort to rezone the surrounding property owned by Loyola; the rezoning was also of vital interest to Loyola."

Petitioner's Appendix A, p. 8a.

In fact, if at any time in the course of the litigation Liljeberg had met with defeat, Loyola's interest would have likewise been defeated. If Judge Collins had ruled against Liljeberg or if he had granted a new trial, or if the Fifth Circuit had reversed Judge Collins' judgment, Liljeberg would have been without a Section 1122 approval. Whereas the right to build a hospital in Louisiana does not depend upon §1122 approval, on March 4, 1982, a zoning ordinance was enacted by the Kenner City Council (Jt. App. 59), which required the possession of a §1122 certificate to build a hospital in the City of Kenner, and without one, Liljeberg would have been prohibited from building a hospital on Loyola's property. Thus, Loyola would have been unable to realize its goal of the construction of a hospital on the property to be sold to Liljeberg. Finally, the ordinance accomplishing the rezoning of Loyola's adjacent land that

was of vital importance to Loyola and a condition of the purchase agreement with Liljeberg, was, by its own terms, not effective until construction contracts had been let and construction commenced on the St. Jude Hospital. Jt. App. 62, 69. As the Fifth Circuit recognized, in the event that the litigation heard by Judge Collins resulted in an adverse ruling to Liljeberg, Liljeberg would not have had a Section 1122 certificate of need, would not have been able to build a hospital in Kenner because of the City's zoning ordinance, and thus could not have let construction contracts and begun construction of the hospital on the Monroe Tract. Under the express terms of the rezoning ordinance, the rezoning of Loyola's adjacent land would have been ineffective and the $9,000,000 increase in the value of its land would not have been realized. Obviously, Loyola's interest in the outcome of this case was substantial while it was before Judge Collins, and in all subsequent proceedings, and thus the final criterion of §455(b)(4) is met.

Accordingly, the Fifth Circuit correctly concluded that ". . . Loyola's interest in the litigation did not terminate as of March 19, 1982, and Judge Collins should have recused himself when he obtained actual knowledge of that interest on March 24." Pet. App. A, p. 8a. Thus, the Fifth Circuit wisely determined that "Judge Collins erred in failing to recuse himself on March 24 when he obtained actual knowledge of Loyola's interest in the litigation." Pet. App. A, p. 9a. The Fifth Circuit, however, deemed it unnecessary to decide the appropriate remedy for this error because of its resolution of the issue of constructive knowledge. Pet. App. A, p. 9a.

The Fifth Circuit decisions discussed hereinabove as well as the Seventh Circuit line of cases cited by Petitioner make it clear that the appropriate remedy is setting aside the judgment rendered by Judge Collins, for even under Petitioner's analysis, the abrogation of the duty imposed by §455(b) demands retroactive relief.

VI.

PETITIONER'S INTERPRETATION OF 28 U.S.C. §455(a) DOES NOT LEND ITSELF TO APPLICATION IN ALL CASES.

Petitioner's analysis is both pragmatic and expedient for it leaves very little "gray area," and purports to provide the quick and easy solution for all cases. Under his formulation, only two determinations are required to decide if a judgment is to be vacated pursuant to §455(a)–(1) whether the motion to recuse was brought before or after entry of judgment, and (2) if it was brought after, whether there was actual bias.[10] As is frequently the problem with formulaic responses to difficult questions, the blind application of the rule to ***all*** §455(a) cases can produce untoward results, as shown by examination of several examples.

---

10. Indeed, this Court has already ruled that the vacating of judgment is the proper remedy where only an appearance of bias exists, even when a challenge was not brought until after an unfavorable award against complainant. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1969), a losing party moved to set aside an award when he learned, *after the award*, of grounds suggesting the appearance of bias. This Court refused to impute improper motives to the arbitrator, but nonetheless ruled that ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid the appearance of bias." This Court, therefore, set aside the award of a three-man panel even though its inquiry was addressed to only one member of the panel.

This case was specifically identified as a source of §455(a) in the statements of John P. Frank, Esq. at the Hearings on S. 1553 and S. 1886 before the United States Senate, Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 93d Cong., 1st Sess. 33-34 (1971) and the Hearing on S. 1064 before the United States House of Representatives, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, 93d Cong., 2d Sess. 11 (1974).

Petitioner correctly informs the Court that this is not a case like *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), where the interest of the judge was "direct, personal, substantial [and] pecuniary." *Id.* at 1586, quoting *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). However, that is a distinction without a difference. The *Ward* case makes abundantly clear that a "direct, personal, substantial [and] pecuniary interest" is not the *sine qua non* of a due process violation. In *Ward*, the mayor of an Ohio town sat as a judge in cases of ordinance violations and certain traffic offenses. Although his town benefited from the fines and costs levied by him against alleged violators, the mayor himself had no direct, personal, substantial, pecuniary interest in the matters. The *Ward* court noted the factual differences between its case and *Tumey v. State of Ohio*, 273 U.S. 510 (1927), where the mayor received additional salary from the fees and costs he assessed, but held that direct financial interest did not define the limits of the due process principle. Furthermore, the *Ward* court recognized that a judge's relationship warrants a presumption of bias in certain circumstances. The judgment against the petitioner was reversed and the matter remanded for new trial.

Petitioner makes no further attempt to reconcile the result reached *Lavoie* with the analysis he advocates. In *Lavoie*, which was decided on due process grounds, the judgment entered by the Alabama Supreme Court was vacated retroactively where there was no evidence of actual bias. This Court underscored the importance of preserving the appearance of justice:

> "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether

> sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true' . . . The Due Process Clause may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'."
> *Id.* at 1587 (citations omitted).

This Court did not perceive that its decision set forth the most stringent requirements possible regarding judicial disqualification. Rather, *Lavoie* delineates only the outer contours of that which is constitutionally mandated:

> "We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. ***The Due Process Clause demarks only the outer boundaries of judicial disqualifications***. Congress and the States, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated today."
> *Id.* at 1589 (emphasis added).

Implicit in this caveat is the proposition that statutory requirements may be imposed which are even more rigorous than that which is constitutionally required.

This Court found no need to view *Lavoie* in a prospective-versus-retroactive framework. If *Lavoie* had been viewed according to Petitioner's analysis, the judgment rendered

by the Alabama Supreme Court could not have been vacated, absent actual bias, for the motion was made after the judgment had been entered. Further, according to Petitioner's reading of the Seventh Circuit rule, *Lavoie* would be categorized as an appearance of impropriety or partiality case, for no actual bias was ever shown. This would therefore preclude the possibility of retroactive vacation of judgment. This Court has already disagreed with Petitioner's argument, wisely deciding that even absent cold, hard proof, where the appearance of justice is so blemished as to cast doubt upon the justice actually done, a judgment must be vacated.

Lavoie clearly shows that Petitioner's interpretation of the Seventh Circuit rule does not lend itself to all cases, particularly those where the appearance of bias or impropriety is so strong that the judgment is tainted thereby even absent proof of actual bias. In such cases, as further discussed in the concurring opinion of Justices Blackmun and Marshall, the concept of harmless error has no application, and vacation of judgment on the basis of potential harm is appropriate. *Id.* at 1591.

The weaknesses in Petitioner's argument that a prospective-versus-retroactive analysis should be automatically applied irrespective of the particular factual circumstances giving rise to a recusal question are further illustrated by attempting to apply it to two other cases, *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980) and *United States v. Brown*, *supra*.

In *Roberts*, plaintiff brought suit against the United States Postal Service, charging that her superiors at the Knoxville, Tennessee Post Office had subjected her to a pattern of sex discrimination in violation of 42 U.S.C. §2000(e)-16 (1976). At a pretrial hearing, the district judge granted a motion to dismiss the Knoxville Postmaster and to substitute the Postmaster General of the United States in his place. At that

time, the district judge commented that "I know Mr. Graves [the Knoxville Postmaster], and he is an honorable man and I know he would never intentionally discriminate against anybody." *Id.* at 127. Plaintiff's counsel filed a motion for recusal which the district court denied, on the basis that 28 U.S.C. §144 requires the party, not his lawyer, to execute the affidavit. Although the Sixth Circuit found no error in this ruling on §144, it nonetheless vacated the judgment rendered after the bench trial because the judge had failed to recuse himself in accordance with his independent duty arising under 28 U.S.C. §455(a). The Sixth Circuit, discerning no actual bias or actual impropriety, vacated the judgment in order to preserve the judiciary's paramount concern with the appearance of impartiality:

> "Once the District Judge expressed his ardent sentiments about Postmaster Graves' character, the objective appearance of impartiality vanished.
>
> We intimate no opinion regarding the actual impartiality of the District Judge. Instead, it is the appearance of impartiality with which we are concerned. As the Supreme Court has written, 'justice must satisfy the appearance of justice.' Clearly, under §455(a), the District Judge had a duty to recuse himself in order to preserve the indispensable semblance of fairness.
>
> Accordingly, the judgment of the District Court is vacated . . ." *Id.* at 129-130.

Petitioner could with relative ease fit the *Roberts* decision into his analysis of the Seventh Circuit framework and justify the vacation of judgment on the ground that relief runs

prospectively from the time a motion to recuse has been brought. According to Petitioner's reading of the Seventh Circuit rule, since the motion to recuse was made prior to trial, vacation of the judgment was appropriate even though no actual partiality or impropriety was shown.

One cannot help but question the wisdom of Petitioner's argument as applied to this case if, for example, the judge had made this same remark to a third party, and the plaintiff only found out about it after trial. Under a narrow reading of the Seventh Circuit rule, the mere fact that the judge made this remark out of the presence of the litigant would deprive the plaintiff in this case of the right to set aside the judgment. This result commanded by such an interpretation of the Seventh Circuit rule reveals its inherent flaw. The judgment rendered in this hypothetical situation would be no less suspect merely because the judge happened to make his remark out of the hearing range of a party with the ability to bring a motion to recuse. Further, the fact that the disqualifying grounds were not learned until after trial would not render such a judgment any less tainted. Finally, there is no logical explanation for these different results based purely on the fortuity of when the disqualifying grounds were discovered, and they bear no rational relationship to the purposes underlying §455(a).

Similarly, if Petitioner applies his rigid reading of the Seventh Circuit rule to *United States v. Brown*, *supra*, a clearly undesirable result would obtain. The relevant facts are as follows.

In May of 1968, H. Rap Brown was convicted of violating the Federal Firearms Act, and was sentenced to five years' imprisonment and fined $2,000.00. His conviction was affirmed by the Fifth Circuit on August 22, 1973. In May of 1974, James B. Lake, Jr., a patent attorney, wrote to Brown's

lawyer, and stated that prior to appellant's trial in 1968, Lake had met the trial judge at a meeting of the Louisiana State Bar Association at the Buena Vista Motel in Biloxi, Mississippi. Lake further stated that while they were sitting around the swimming pool, he heard the judge say that he was going to preside at Brown's trial and "that he was going to get that nigger." *Id.* at 468. Shortly after receipt of Lake's letter, appellant filed a motion to vacate his conviction and sentence, or alternatively to correct or reduce the penalties imposed by the trial court. The motion was heard by another judge who heard Lake's testimony as well as that of the original judge. The judge testified that he could not remember the particular statement, but denied that he would ever make such a remark:

> "When asked if he ever made such a statement, the judge answered:
>
> 'I can't remember what statement I made at that time but I would categorically deny that I would make such a statement.' " *Id.* at 468.

In his written opinion of September 15, 1975, Judge Cassibry denied Brown's motions, concluding that the trial judge's comment cast a serious shadow on the appearance of justice, but did not prejudice the fairness of the trial itself. The Fifth Circuit reversed Judge Cassibry and vacated the eight-year-old conviction and sentence, finding the trial judge's statement inconsistent with the goal of preserving the appearance of justice codified in 28 U.S.C. §455(a):

> "The judge's statement did not comport with the appearance of justice, and it cannot be said from the record alone that appellant received a fair trial. Accordingly, the conviction and sentence must be vacated." *Id.* at 470.

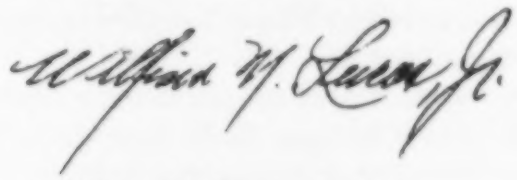
If Petitioner's argument were applied to the facts of the *Brown* case, the original judgment would stand, because relief would run prospectively from the time of the motion to recuse or vacate (which was brought more than six years from the date of judgment), and because there was no definitive finding of any actual bias. Moreover, according to Petitioner's reasoning, because the judge had no recollection of making the statement at issue and categorically denied the possibility of ever having uttered such words, a reasonable person could not possibly harbor doubts about the judge's actual impartiality. Where, as in *Brown* and the case currently pending before this Court, there is conflict between the judge's sworn testimony and other evidence, it is impossible to make the seemingly facile distinction between actual bias and the appearance of bias that Petitioner advocates, without blindly accepting the absolute truth of the judge's testimony. The public should not be required to put its faith in a judiciary whose standards for judicial conduct are premised on such flawed rules.

In sharp contrast to Petitioner's hypothesis about the adverse impact of the Fifth Circuit's ruling in this case on the administration of justice (which is belied by the Fifth Circuit's experience), the application to *Brown* of the unyielding interpretation of the Seventh Circuit rule vividly illustrates the miscarriage of justice that acceptance of Petitioner's argument could engender. Public confidence in the impartiality of the judicial process, one of the overriding goals of §455(a), would be shaken to its very foundation if Petitioner's formula were applied to this case.

CONCLUSION

For the above and foregoing reasons, therefore, it is respectfully submitted that this Honorable Court should affirm the Fifth Circuit's ruling in this case. The Fifth Circuit's decision ensures the integrity of the judicial system and is entirely consistent with the intent and purpose of 28 U.S.C. §455.

Respectfully submitted,



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HEALTH SERVICES ACQUISITION CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent seeks to set aside an unfavorable judgment in this case because the trial judge presided without realizing that his decision might affect a university of which he was a trustee. To justify such relief, on a motion filed almost 18 months after final judgment, respondent urges, first, that any violation of the federal recusal statute (28 U.S.C. § 455), whatever the grounds, is sufficient to require such retroactive relief and, second, that violations of Section 455 can be created by imputing to a judge the knowledge of unknown facts. Virtually the sole explanation for these positions is that Congress was concerned about preserving, not just the fact, but the "appearance" of impartiality.

This "appearances-at-all-costs" approach is an unnecessarily extreme one. To begin with, although Section 455 does not speak directly to the subject, we think that retroactive recusals should be granted only in exceptional cases. That rule is the one followed generally for motions under Rule 60(b)(6), and it is the one most compatible with the relevant legislative history. The rule also takes account of important interests in finality and repose—without elevating those interests to an absolute bar—and would deter litigants from withholding recusal motions, or deciding not to investigate grounds for such motions, as a matter of litigation strategy. The Seventh Circuit, for these and related reasons, has reached the sound conclusion that recusals are prospective except upon a showing of bias or prejudice. *See, e.g., United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986); *United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985).

The grounds cited here for retroactive recusal are anything but exceptional. The Fifth Circuit found only an "appearance of impropriety" under Section 455(a), a lapse that primarily if not exclusively affects the judicial system itself rather than the individual litigants and that, standing alone, offers little justification for the harsh remedy of setting aside a final judgment. *See United States v. Murphy, supra.* Furthermore, even the "appearance" in this case depends upon the device of imputing knowledge to the judge, so that he is presumed to have known what he did not actually know. An award of retroactive relief under these circumstances is particularly improper because Congress deliberately did not require recusal under Section 455(b) unless a judge *knows* of his fiduciary interests, 28 U.S.C. § 455(b)(4) and because it chose a far more tolerant view of fiduciary interests arising from service by judges as trustees of public institutions. 28 U.S.C. § 455(d)(4)(ii). Respondent simply offers too little, too late.

1. Recusals Under Section 455 Should Invalidate Final Judgments Only in Exceptional Circumstances.

Perhaps the most striking fact about the briefs filed by respondent and supporting *amici curiae* [1] is that they suggest no different standard for recusal motions seeking retroactive, rather than prospective, relief. Their message is plain and simple: if any violation of Section 455 has occurred, even if it involves nothing more than an "appearance" of impropriety, the case must begin again. This absolute approach is necessary, say respondent and *amici*, to preserve public confidence in the fairness of the judicial system.

This argument rests upon an improbable premise: that maintaining "appearances" is to be regarded as Congress' sole and overriding goal, regardless of the consequences. No one questions that Congress intended the provisions for recusal to enhance public regard for the administration of justice, but it hardly follows that Congress also meant to dispense with other long-established rules and policies developed to protect litigants and the judicial system itself. That theory would mean that a litigant could reopen proceedings even twenty or thirty years after an adverse judgment, merely by citing newly-discovered facts sufficient to raise an "appearance" of partiality, without any regard to the important interests of certainty and repose.[2] Respondent and *amici* cite

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[1] Brief for *Amici Curiae* Kenneth W. Davis, Jr., *et al.* ("Davis Br."); Brief of *Amici Curiae* NEC Corporation and NEC Electronics Inc. ("NEC Br.").

[2] There are certainly elements of unfairness—indeed, often genuine unfairness as opposed to just "appearances" of it—in rules that leave judgments intact despite the uncovering of possibly decisive new evidence or despite later decisions revealing a mistake in the law applied to the case. *See, e.g.* Rule 60(b)(2), Fed. R. Civ. P. (one year limit for motions based on newly-discovered evidence); *McKnight v. United States*, 726 F.2d 333, 336 (7th Cir. 1984) ("a change in the applicable law after entry of judgment does

no evidence whatever that Congress meant Section 455 to have such unprecedented scope.

The legislative history, in fact, suggests quite the opposite. *See* Pet. Br. 19-21. It is readily apparent, for example, that Congress was willing to employ a broad general standard for recusals under subsection (a) on the assumption that the usual effect of such recusals was simply for the first judge to "disqualify himself and let another judge preside over the case." H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6355. That assumption is not easily transported, however, into situations where "the case" has ended and the relief sought is to invalidate all the prior proceedings. At that point, the issue is not one of adjusting judicial calendars, but of treating judicial rulings as if they had not occurred. The two cases are not identical, and Congress certainly gave no indication that it thought they were.

The relatively few references in the legislative history to possible retroactive relief, while admittedly not defining a clear standard, further reveal a strong sensitivity to the problems caused by belated motions for recusal.[3] Thus, the legislative history contains statements indicating that relief after appeal would not be available at all, *see* Senate Hearings at 18, 22 (Sen. Bayh), 36 (John

not, by itself, justify relief under 60(b)"). Yet, the need for some end to litigation is deemed sufficiently compelling to foreclose further activity in such cases.

[3] *See generally* Judicial Disqualification: Hearings on S. 1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. (1973) (Senate Hearings); Hearings on S. 1064 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 93rd Cong., 2d Sess. (1974) (House Hearings). Relevant excerpts, alluded to in the text below, are set forth in our opening brief at pages 20-21 and will not be requoted in full here.

Frank), and other statements raising the possibility of post-appeal attacks in the context of cases involving a denial of due process (for example, direct and personal financial interests in the outcome). *See* House Hearings at 16 (Judge Traynor), 17 (John Frank).[4] The legislative record appears to show somewhat greater latitude for first raising the issue of recusal on appeal, *see* House Hearings at 22 (Sen. Bayh), 36 (John Frank), but no Congressman or witness said, or even implied, that the usual standards for reviewing such claims, such as "plain error" or "manifest hardship," would be inapplicable. Viewed as a whole, therefore, the legislative history of Section 455 is inconsistent with respondent's notion that any finding of violation automatically carries with it a right to have the judgment set aside.[5]

So far as we can tell, the Fifth Circuit stands alone in adopting so radical a position. In particular, the Seventh Circuit—the court of appeals that has given the most explicit attention to the issue—has determined that recusals should always be prospective in the absence of a showing of bias or prejudice. *See United States v. Murphy*; *United States v. Widgery*.[6] This approach pro-

[4] Judge Traynor specifically expressed his doubt about relief for an "appearance of impropriety." House Hearings at 17.

[5] The Fifth Circuit did not consider this legislative history or, for that matter, the governing standards of Rule 60 (b)(6), the basis for the particular motion in this case. As we noted in our opening brief, Pet. Br. 22, relief under Rule 60 (b)(6) is commonly available only in "extraordinary cases." *See Ackermann v. United States*, 340 U.S. 193, 199 (1950). Although the legislative history of Section 455 provides some support for a flat bar against post-appeal recusal motions, we think that the better rule would permit such motions but only in exceptional cases. Respondent's attempt to show that its case is exceptional amounts to a wholly circular argument that the case must be exceptional because the Fifth Circuit invalidated the judgment. Resp. Br. 22.

[6] This standard does not require, as respondent seems to think (Resp. Br. 40-47), that a litigant must show bias and prejudice by demonstrating actual partiality. The existence of bias and preju-

vides a rational middle course; rather than holding that litigants can *never* set aside prior rulings regardless of the nature or degree of judicial impropriety, or that litigants can *always* set aside prior rulings even for the most minor transgressions, the court recognized that retroactive recusals require a greater showing than prospective ones. Other circuits, considering motions first made on appeal, have declined to invalidate judgments unless movants satisfy the higher standards usually applied to charges of error not raised before judgment. *See Weiss v. Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302, 304 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *United States v. Schreiber*, 599 F.2d 534, 535 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

A requirement of bias or prejudice, or some similar standard, makes considerable sense from several standpoints. Most obviously, it gives weight to the recognized interests in finality—in particular, the interests in providing reasonable certainty in judicial affairs and the avoidance of vexatious litigation. Confidence in the judicial system does not depend only on the "appearance" of fair adjudication but on the application of rules that allow for reasonable reliance on judicial decisions and prevent litigants, particularly litigants with disproportionate power or resources, from prevailing by sheer

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dice is, in effect, a legal conclusion drawn from specific facts—for example, prior statements or actions by the judge or a known stake in the outcome of the case. *See, e.g., New York City Development Corp. v. Hart*, 796 F.2d 976, 978 (7th Cir. 1986). That is the clear import of the cases cited by respondent, such as *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), in which the courts observed that it was enough to show grounds for inferring bias or prejudice without also demonstrating misconduct in deciding the case. What respondent seeks to do here, however, is to reduce the threshold of proof to an even lower level, allowing it to obtain relief based solely on "appearances" even when grounds for inferring bias and prejudice are absent.

open-ended litigiousness. There is nothing remarkable about a rule that, in the absence of bias or prejudice, a litigant should not have to win his case twice.

A stricter standard for retroactive relief also diminishes the incentive for litigants to withhold possible grounds of recusal until they see the judgment. Although respondent contends that the requirement of timeliness (i.e. that motions be made shortly after learning the grounds) will prevent this sort of behavior, Resp. Br. 11 n.3, that assurance is a largely empty one. A litigant willing to consider this tactic in the first place may well be willing to deny that he had prior knowledge, and proof to the contrary, even circumstantial proof, may be hard to come by.[7] Furthermore, the timeliness requirement does nothing to prevent litigants from deciding not to investigate possible grounds for recusal,[8] a point given added prominence by the insistence of respondent and *amici* that litigants have no duty to make any such investigation. Resp. Br. 22 n.6; NEC Br. 23; Davis Br. 26.[9]

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[7] We note that respondent's concern about undisclosed knowledge on the part of judges is not matched by a similar concern regarding litigants. Litigants, of course, may be subject to far more severe pressures than judges to hold back such knowledge.

[8] In its brief, respondent does not say that it was unaware of the negotiations between Loyola and petitioner, just that the negotiations "were not matters of public record at the time the suit was filed." Resp. Br. 22. Since respondent's parent company (Hospital Corporation of America (HCA)) was also negotiating with Loyola, J.A. 32, the fact that other negotiations were not "matters of public record" does not mean that respondent, had it reviewed Judge Collins' financial disclosure statement in a timely fashion, could not have learned the additional facts with a modicum of diligence.

[9] The brief filed by *amicus* NEC Corporation frames this issue in particularly stark terms. Seeking to show that the relief sought in this case is not retroactive at all, NEC argues that the trial judge was always disqualified, even though he did not know it, by the mere fact of Loyola's possible interest. This "void *ab initio*" theory removes even the slightest incentive for litigants to discover grounds

We thus see no basis, either in Section 455 itself or in reasons of policy, to place all recusal motions in a special, favored category for purposes of awarding retroactive relief. That serious remedy should be reserved for cases of the most serious misconduct.

2. This Case Does Not Present Exceptional Circumstances Justifying Retroactive Relief.

Because respondent treats grounds for retroactive recusal and for prospective recusal as essentially one and the same, much of its brief simply addresses whether a violation of Section 455 occurred. Respondent naturally agrees with the Fifth Circuit that retroactive relief may be based upon an "appearance" of impropriety under Section 455(a) and that the "appearance," in turn, may be based on knowledge imputed to, but not actually had by, the judge. Respondent also revives, and one *amicus* stresses, an argument rejected by the Fifth Circuit: that recusal was required under Section 455(b)(4) as well. Resp. Br. 36-39; NEC Br. 11-21.

Before turning to these arguments, we note certain facts of relevance to the legal issues. It is undisputed that the allegations in this case do not charge the trial judge (Judge Robert F. Collins) with any personal bias or prejudice or with any personal interest in the lawsuit; the allegations rest solely upon his service as a trustee for an educational organization (Loyola University). *But see* 28 U.S.C. § 455(d)(4)(ii) (exemption relating to judges holding office in such organizations). Loyola University was not a party to the lawsuit and

for recusal since every adverse ruling is automatically without legitimacy. In NEC's own case, the judge's ownership of stock was set forth in a financial report filed in May 1986 but not inspected by NEC until October 1986, several weeks after an adverse ruling. *See NEC Corp. v. Intel Corp.*, 654 F.Supp. 1256, 1259 n.3 (N.D. Cal. 1987).

The Seventh Circuit has held that the filing of a motion to recuse starts the time for prospective recusal. Actions taken after that

was not mentioned during the proceedings. Moreover, Judge Collins himself represented, and another federal judge later found, that Judge Collins, at the time of judgment, had no actual knowledge of the real estate negotiations said to give Loyola an interest in the case. Pet. App. 50a, 24a-25a. The gravamen of the charge, therefore, is that Judge Collins, by greater attentiveness to this aspect of Loyola's affairs, could or should have known of the negotiations. These facts provide no basis for setting aside the judgment under any of respondent's various theories.

a. *An Appearance of Impropriety Is Inadequate to Support Retroactive Relief.* Retroactive relief—especially, the setting aside of a final judgment—is too severe and disruptive a remedy for an "appearance" of impropriety. The Fifth Circuit undertook no analysis of this issue, relying solely upon a previous holding of the court. Pet. App. 11a, citing *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983). (In *Hall*, the decision to vacate the judgment was likewise made without any discussion of the propriety of the remedy. *See* 695 F.2d at 178-80.) The Fifth Circuit recognized the rule adopted by the Seventh Circuit—that recusals based on "appearances" are prospective only—but rejected it without further comment on the basis of *Hall*. Pet. App. 10a-11a.

The abbreviated discussion by the court of appeals leaves unanswered several important points about Section 455(a), each of which was relied upon by the Seventh Circuit in fashioning its rule. As that court noted, subsection (a) is aimed particularly at "perceptions rather than actual defects in the administration of justice." *United States v. Murphy*, 768 F.2d at 1540; *see* Pet. Br.

time—when neither lack of knowledge by the judge nor strategic nondisclosure by the litigants is any longer possible—may be invalidated if the court of appeals determines, on a petition for mandamus, that recusal is necessary. *New York City Development Corp. v. Hart*, 796 F.2d 976 (7th Cir. 1986).

11-13.[10] Moreover, Congress expressly chose to treat grounds for recusal under subsection (a) in a less rigorous manner than the specific grounds set forth in subsection (b). *Id.* This distinction is clearly reflected in the separate provision for waiver, 28 U.S.C. § 455(e), which permits waiver in every case under (a) and forbids it in every case under (b).

Although respondent quarrels with the idea that there is a difference between (a) and (b), Resp. Br. 35, it conveniently disregards the waiver provision and the distinction between (a) and (b) implicit in its divergent standards. It is possible, of course, to debate the line drawn by Congress, given the fact that some violations of subsection (b) may seem relatively inconsequential. But the fact remains that Congress elected to draw the line where it did, apparently with the waiver issue squarely in mind, and did so in one of its few departures from the precise format of the Code of Judicial Conduct. It seems entirely reasonable, therefore, to put recusals based on "appearances" on a different footing from recusals based on violations of Section 455(b). Furthermore, the fact that some grounds for recusal under (b) might not warrant the invalidation of a judgment argues more for limiting the remedy under (b) than for extending it under (a).[11]

The very vagueness of the "appearances" standard also presents serious problems when applied after the fact. It

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[10] Respondent seems not only to concede this point, but to emphasize it. Resp. Br. 26-27. In rejoinder to our argument that respondent has shown no genuine hardship or injury resulting from the "appearance" at issue here, respondent repeatedly calls attention to possible damage to the "judicial system." The Seventh Circuit properly concluded that this damage, in and of itself, is not enough to support the upheaval caused by retroactive relief.

[11] Because the court of appeals in this case correctly found no violation of Section 455(b), *see* pages 17-19 *infra*, there is no need here to decide whether all violations of that section require the granting of retroactive relief.

seems far more likely that judges will unwittingly fail to recognize a possible question of "appearances,"—given the "eye of the beholder" nature of all such violations—than fail to recognize the existence of the more concrete grounds under Section 455(b). If "appearances" can be based on facts that a judge does not know, as respondent submits, then the threat of unwitting violations of subsection (a) will be even greater. Thus, the "catch-all" language of that section, meant to be suitably encompassing for prospective relief, would enable litigants, like respondent, to manufacture charges of judicial misconduct out of what is, at most, inadvertence, and reopen their cases based on such charges. It is hard to believe that Congress had any such thing in mind when it enacted Section 455(a).

b. *Retroactive Relief is Particularly Inappropriate When the "Appearance" Rests Upon the Fiction of Imputed Knowledge.* To establish its claim of an "appearance" of impropriety in this case, respondent must first impute to Judge Collins knowledge that, according to the findings of a separate district judge, Judge Collins did not have. Pet. App. 24a-25a. Respondent appears to concede that a judge cannot be expected to recuse himself on the basis of facts he does not know, Resp. Br. 12, but argues that the standard is needed to provoke greater awareness about financial matters and circumvent sensitive issues regarding a judge's credibility. Resp. Br. 12, 27-34. Both arguments are unconvincing as a general matter, and all the more so on the facts of this case.

We see no persuasive evidence that Congress wished to punish a lack of judicial diligence by forcing litigants into a second trial. While the legislative history contains some general discussion of the need for judges to keep abreast of their affairs, the precise grounds for recusal under subsection (b)(4) expressly require knowledge of an alleged interest. *See* 28 U.S.C. § 455(b)(4); pages 17-18 *infra*. Given that background, it seems even more

capricious to turn negligence into a basis for retroactive relief pursuant to subsection (a). Leaving aside for a moment the question of the judge's credibility, which seems an implicit part of this argument as well, no genuine unfairness could or would result if a judge negligently failed to realize that he had some interest in a case before him. An objective observer, knowing the facts and accepting them as true, might be concerned that the judge did not take more care in his affairs, but he could not possibly think that the judge was prone to favor one party over the other without knowledge of the reason to do so. To invalidate the judgment, then, simply attempts to penalize the judge for his lack of knowledge, with the bulk of the harm falling on one of the litigants instead.

The irrationality of such a penalty would be even more pronounced in this case. The question may fairly be asked: just what duty did Judge Collins fail to perform? It was not that he was unaware of his fiduciary office (he knew); or that he did not pay attention to the names of the parties before him (he knew); or that he did not notice references to Loyola University when they came up in the case (none did); or even that he failed to learn of assets owned by the university (he presumably knew that it owned land as well as other things). Rather, the neglect attributed to him was that he was not sufficiently attentive to discussions about the University's land holdings to recognize names of potential buyers, only one of which had been mentioned during the two preceding years and then only once. *See* note 14 *infra*. Quite apart from the fact that Congress wanted less severe recusal standards for trustees of educational institutions, see pages 18-19 *infra*, it is beyond reason to invalidate a judgment to make judges into more assiduous university trustees. The most likely effect would be to stimulate resignations from their trusteeships by judges concerned about possible inchoate grounds for

recusal—a result that, "as a matter of policy," the provisions of Section 455 were designed to avoid. *See* Senate Hearings at 105 (Professor Thode).

The other argument offered by respondent for imputing knowledge to a judge is that it prevents inquiries into the judge's credibility. We do not deny that such inquiries carry with them a certain awkwardness, but it must be recognized that questions regarding a judge's credibility are part and parcel of the process of recusal. The allegations in a recusal motion are necessarily focused upon the behavior of the judge himself—that is, after all, the whole point of a recusal motion—and many such motions thus will involve issues on which the judge's own knowledge sheds important light. For example, if a litigant accuses the judge of making a hostile out-of-court statement, it is necessary to ask whether the judge made the alleged remark. If he did, grounds for recusal may well exist; if he did not, then recusal based on the mere charge would be inappropriate. The judge's statement may not always be accepted, *see United States v. Brown*, 539 F.2d 467 (5th Cir. 1976), but it is essential to a proper decision on the motion.

Respondent is simply mistaken that evaluations of a judge's credibility conflict with the objective standard that Congress sought to apply in Section 455. The question here is not whether Congress meant to impose an objective standard—that intention is not in dispute—but whether Congress meant the objective standard to displace the traditional factfinding authority of the judiciary. It seems quite clear that Congress did not. Both the old subjective and the new objective standards pertain to the *conclusion* to be drawn from the facts, not to the question of the facts themselves. Thus, the prior version of Section 455 required a judge to recuse himself only if circumstances made it "improper, *in his opinion*, to sit on the trial . . ." (28 U.S.C. § 455 (1970 ed.) (emphasis added)); the current version was intended to

replace that subjective assessment of propriety by an objective assessment, *i.e.*, as seen by a hypothetical "reasonable man." There is no indication, however, that Congress meant the objective standard to be used to resolve disputed issues of fact as well.

The role of the "reasonable man," while important, is thus narrow: it is to determine whether, based upon all the facts, an "appearance" of impropriety exists, not to find what the facts are. Indeed, the nature of that role is spelled out in the standard definition of the "reasonable man" test in these circumstances: "Any conduct that would lead a reasonable man *knowing all the circumstances* to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." Thode, *Reporter's Notes to the ABA Code of Judicial Conduct* at 60 (1973) (emphasis added).[12] The task of deciding the facts—in effect, establishing what the reasonable man knows—is reserved for the judge himself or, in particular cases, for another federal judge.[13]

Issues of credibility could always be avoided by accepting as true all allegations pertaining to the conduct or state of mind of the judge. Indeed, a comparable practice is followed under another federal recusal statute, 28 U.S.C. § 144, where recusal is initiated by a verified affidavit that the judge must take as true even though

[12] The state of mind of an individual is, of course, a fact at issue in many cases. *See, e.g., United States v. Bailey*, 444 U.S. 394, 403-06 (1980) (discussing "hierarchy of culpable states of mind"). Here, the Fifth Circuit simply read that "fact" out of the "reasonable man" test.

[13] Judge Collins sought to assign the first recusal motion filed against him, in a related case, to a second judge, who returned the motion to Judge Collins. Pet. App. 56a n.1. The Fifth Circuit later determined that a different judge should make factual findings regarding Judge Collins' knowledge of Loyola's interest. Pet. App. 45a-46a.

he knows it to be false. *See Berger v. United States*, 255 U.S. 22 (1971); Pet. Br. 15-16. But that is not the practice followed under Section 455, nor should it be. As the Seventh Circuit has said, under Section 455 "the judge is free to make credibility determinations, assign to the evidence what he believes to be its proper weight, and to contradict the evidence with facts drawn from his own personal knowledge." *United States v. Balistrieri*, 779 F.2d 1191, 1204 (1985), *cert. denied sub. nom. Disalvo v. United States*, 106 S.Ct. 1490 (1986); 13A Wright & Miller, Federal Practice and Procedure § 3550, at 629 ("court is not required to accept the factual statements as true"). That procedure, which likewise applies to a motion for prospective relief, finds even greater justification in the case of a motion for retroactive relief, where the impact of granting the motion would be so much more unsettling.

The real problem for respondent here is not the process of factfinding, but the result: the finding that Judge Collins did not know about Loyola's possible interest until after judgment. Since that finding was left undisturbed by the court of appeals,[14] respondent now must mount an

[14] The court of appeals did not hold the finding of lack of knowledge to be "clearly erroneous," nor, in our opinion, could it have done so. As the findings of Judge Schwartz (Pet. App. 17-25a) show, the principal references to St. Jude, and the solitary reference to petitioner, took place in January 1980, approximately two years before trial. Soon thereafter, there was a lull of 18 months in which no negotiations with St. Jude or petitioner were even taking place. Overall, in the period from January 1980 to January 1982, the name St. Jude was mentioned *once* (at the November 12, 1981 meeting) and petitioner's name was *never* mentioned. In light of the fact that, during these two years, the Loyola Board discussed dozens upon dozens of different matters, and in his judicial capacity Judge Collins presided over a docket of hundreds of cases, it is hardly astonishing that the mention of St. Jude in this case did not trigger recollection of the scattered references at Loyola meetings. The court of appeals was correct, therefore, in accepting that finding as controlling.

indirect attack by speculating that objective observers might question findings about a judge's lack of knowledge and that federal judges may be overly protective of their colleagues. Resp. Br. 30-33. The same claims, of course, would require a rewriting of subsection (b)(4) and parts of (b)(5), in light of the express requirement of knowledge in those provisions. But, in any event, unless judges are denied the opportunity to speak to the asserted grounds for recusal, and to testify about and explain their actions, the concerns voiced by respondent are inherent in virtually any attempt to decide contested facts regarding the conduct of a judge. Truth is not an absolute, and a credible explanation to one observer may seem implausible to another. The traditional method of deciding matters of fact is not to guess at how the different versions would look to a third party, but for a judge to make specific findings based upon his judgment, including his judgment with regard to credibility. Appellate courts may overturn these findings, but not just because the particular judges might have been inclined to find the other way. *See Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1512 (1985).

It would be ill-advised to abandon this practice in cases involving retroactive recusal, merely because a hypothetical observer might have doubts about the finding. The consequences of retroactive recusals are sufficiently harsh that such action should not flow from skepticism alone.[15] If a judge has sat knowingly despite a disqualifying interest, then his decision may reasonably be set aside; but if he has sat unknowingly, then it is unfair both to the prevailing litigant and to the judge to treat the decision as tainted in the same fashion.

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[15] We do not regard with alarm the possibility that one judge might assign to another judge a presumptive credibility. Although exceptions will arise, and the presumption should not be irrebuttable, it seems more likely than not that judges will be open and honest about their actions and knowledge.

c. *This Case Does Not Involve Grounds for Recusal Under Section 455(b)(4).* The court of appeals held that the judgment could not be set aside under Section 455(b)(4) because that section requires the judge to know about the specified grounds for recusal. Pet. App. 10a-11a. Respondent now argues, and *amicus* NEC argues at even greater length, that Section 455(b)(4) was violated after all. Resp. Br. 36-39; NEC Br. 11-21. The argument is incorrect.

The short answer to the argument is the plain language of Section 455(b)(4), which expressly and unequivocally requires knowledge. *See Davis v. Xerox*, 811 F.2d 1293 (9th Cir. 1987). To get around that language, respondent and *amicus* NEC try to introduce their imputed knowledge theory into (b)(4), with NEC contending that judges are conclusively presumed to know about their personal and fiduciary interests. If Congress meant to impose that presumption, however, it took an inexplicably roundabout way of doing so, for the provision in (b)(4) regarding a judge's knowledge of his personal and fiduciary interests in (b)(4) could easily have been detached from the provision regarding knowledge of his other interests and those of his family. The failure to take this simple step could hardly have been an oversight; the structure of Section 455(b) as a whole makes it clear that Congress, following the Code of Judicial Conduct, included and excluded the requirement of knowledge according to the particular grounds set forth. As a matter of statutory construction, therefore, respondent's position is untenable.

Respondent and *amici* also ignore the indisputable fact that Congress meant to treat trustees of public institutions differently from trustees of private or family trusts. Section 455(d)(4)(ii) provides that an office in an educational organization is not "a 'financial interest' in securities held by the organization." The legislative

history goes on to reveal a concern that, if requirements were too strict, judges would be forced to choose between serving as judges and serving as trustees of public institutions. *See* Senate Hearings at 94-105 (Professor Thode). Thus, under the statute, a judge does not have to inform himself about the "financial interests" of the institutions that he serves and, seemingly, is not automatically disqualified under (b)(4) even if he knows of such an interest.

Against this legislative background the attempt to charge Judge Collins with knowledge of negotiations affecting Loyola's real estate interests is especially unreasonable. Although respondent apparently seeks to impose a duty on trustees to know about all real estate holdings of a university, that position was correctly rejected by the court below. Pet. App. 44a n.3 (finding that exemption for "financial interest" applied.)[16] Whatever appeal that theory might have in the abstract, it is impossible to see why Congress, which deliberately sought to limit the obligation of judges to learn about institutional holdings, would have imposed on the same judges the duty of learning about every financial interest of a university other than its stocks and bonds, and then required automatic recusal based upon any such interest, regardless of its nature or extent. Respondent cites no legislative history or other support for that illogical conclusion.

Respondent simply cannot fit its theories between the facts, on the one hand, and Section 455, on the other.

[16] The "duty to know" argument made by NEC, which tries to revise the language of (b)(4) by reference to the provisions of Section 455(c), would lead to absurd, and surely unintended, distinctions. According to NEC's position, a judge would be required to know about every financial interest (except "securities") of a university that he served as a trustee, but would *not* be required to know about his wife's financial interests, because with regard to the latter his duty is phrased in terms of "reasonable efforts."

Judge Collins decided this case while unaware that Loyola had a possible interest in its outcome. That conduct does not justify retroactive recusal under Section 455.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1987

JOHN A. LILJEBERG, JR.,
Petitioner,

vs.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

BRIEF OF AMICI CURIAE NEC CORPORATION AND NEC ELECTRONICS INC. IN SUPPORT OF RESPONDENT HEALTH SERVICES ACQUISITION CORP.

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No. 86-957

IN THE

Supreme Court of the United States

October Term 1987

JOHN A. LILJEBERG, JR.,
Petitioner,

vs.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

BRIEF OF AMICI CURIAE NEC CORPORATION AND NEC ELECTRONICS INC. IN SUPPORT OF RESPONDENT HEALTH SERVICES ACQUISITION CORP.

INTEREST OF AMICI CURIAE

Amici Curiae NEC Corporation and NEC Electronics Inc. ("NEC") submit their brief in support of Respondent Health Services Acquisition Corp. ("Health Services") with the written consent of the parties.[1]

On March 30, 1987, NEC filed a petition for a writ of mandamus in the Court of Appeals for the Ninth Circuit to vacate an order of the District Court (Honorable William

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[1] The written consents of the parties are filed herewith, pursuant to Rule 36.2 of the Rules of the Supreme Court.

W Schwarzer) denying NEC's motion to disqualify Judge William A. Ingram and to vacate his rulings made while he owned an undisputed financial interest in Intel Corporation ("Intel"), the sole party defendant, and to disqualify him from resuming control of the case after divesting his interest in Intel. NEC invoked disqualification under 28 U.S.C. §455(a) and (b). (Briefing has not concluded before the Ninth Circuit.) *NEC Corporation v. Intel Corporation*, 654 F.Supp 1256 (N.D. Cal. 1987).

NEC discovered Judge Ingram's stock ownership before all issues in the trial on the merits had been resolved and thereupon promptly moved to disqualify him; thus, the second issue upon which this Court has granted review is not before the Ninth Circuit. The first and third questions presented for review are intimately intertwined with two of the issues pending on the mandamus petition: (1) Are rulings by the judge while disqualified under 28 U.S.C §455(a) or (b) valid if made before the parties have discovered the disqualifying facts and called them to the judge's attention? [2] (2) Is a judge disqualified under 28

[2] On December 21, 1984, NEC filed an action for declaratory relief against Intel seeking a declaration that certain alleged Intel copyrights in "microcode" are invalid and/or not infringed by certain NEC microprocessors. Intel counterclaimed for infringement. On May 1, 1986, seven days after the pretrial conference and eleven days prior to trial on the merits, Judge Ingram certified his 1986 Financial Disclosure Report to the Judicial Ethics Committee. In that report, Judge Ingram disclosed for the first time his financial interest in Intel.

On September 22, 1986, Judge Ingram signed Partial Findings of Fact and Conclusions of Law holding Intel's microcode copyrights valid. 645 F. Supp. 590 (N.D. Cal. 1986). At the same time, Judge Ingram ordered the trial reopened before ruling on the remaining issues, including copyright infringement. NEC discovered Judge Ingram's 1986 Financial Disclosure Report and his financial interest in Intel on October 8, 1986, and thereupon filed a motion for disqualification. The motion was reassigned to Judge Schwarzer and presented on affidavits and on the

U.S.C. §455(a) or (b) if he was not "consciously aware" of the disqualifying facts?

SUMMARY OF THE ARGUMENT

Judge Collins was disqualified from the moment the case came before him because, at that time, (1) facts existed that would cause a reasonable person to question his impartiality, thereby disqualifying him under §455(a); and (2) he had a fiduciary financial interest or an "other interest" in the subject matter of the case, mandatorily disqualifying him under §455(b)(4).

The premise of Petitioner's argument that the Fifth Circuit "retroactively" disqualified Judge Collins is that §455(a) disqualification does not arise until the judge has actual knowledge of the disqualifying facts. The premise is

record of the proceedings before Judge Ingram without any discovery or evidentiary hearing.

On March 5, 1987, Judge Schwarzer denied NEC's motion by memorandum and order. 654 F.Supp. 1256 (N.D. Cal. 1987). Judge Schwarzer held, *inter alia*:

(1) While the Financial Disclosure Report may be sufficient evidence of Judge Ingram's knowledge of a financial interest in Intel, Judge Ingram was not disqualified under §455(b)(4) because NEC had not shown that Judge Ingram had "conscious awareness" of his financial interest in a party in that NEC had not shown that Judge Ingram had connected his knowledge that he had a financial interest in Intel with the fact that Intel was the sole named defendant in the action before him.

(2) A judge with a financial interest in a party to the action before him is not disqualified prior to motion by a party because he is deemed to lack conscious awareness of his disqualifying financial interest until a party discovers and brings his financial interest to his attention.

(3) Because Judge Ingram's financial interest in Intel did not disqualify him until NEC informed him of its interest, all rulings before that date are valid.

(4) Having divested himself of the Intel stock upon NEC's motion, Judge Ingram is not disqualified from further proceedings.

erroneous because Judge Collins was always disqualified. Section §455(a) says nothing about knowledge. Congress did not intend to place the judge's state of mind in issue on a motion to disqualify. If a knowledge element is read into §455(a) from §455(b), Judge Collins was chargeable with such knowledge because §455(c) imposed upon him the duty to know his fiduciary financial interests, and he was under a legal duty as a fiduciary of Loyola University to keep himself informed of the substantial financial interests of the institution.

Judge Collins was mandatorily disqualified by §455(b)(4) because he had a fiduciary financial interest by reason of Loyola's substantial financial stake in the controversy before him. Because he was statutorily bound to know his disqualifying interest, he is deemed to know it. His forgetfulness does not remove his disqualification, and he will not be heard to say that he did not remember. The knowledge element of §455(b)(4) was intended to apply only to those disqualifying facts that the judge was not statutorily compelled to know. To require "conscious awareness" of a disqualifying fact that the judge was bound to know would remove the bright line that Congress intended to draw between those facts that *per se* disqualify the judge and those that do not and between disqualification that can be waived by the parties and that which cannot. Section 455(e) prevents waiver of disqualification based on §455(b), but permits waiver of disqualification based only on section 455(a) if a judge has fully disclosed the potentially disqualifying facts on the record. If mandatory disqualification were removed whenever a judge closed his eyes to facts that he was statutorily required to know or he knew and forgot such facts, Congress' overriding purpose in enacting §455 to protect the reputation of the federal judiciary would be defeated.

When a judge is disqualified under §455(a) or (b) or both, his decisions made while disqualified cannot stand. The correct remedy is vacation of his decisions, whether or not embodied in a judgment. *E.g., Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983). *Cf. Aetna Life Ins. Co. v. LaVoie*, — U.S. — , 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986).

That remedy is no more "retroactive" than an ordinary reversal with directions for a new trial. Vacation of the decisions of a disqualified judge does not have the potential for abuse by litigants. The parties have no obligation to know or to discover potentially disqualifying facts. If the judge fully discloses such facts on the record, pursuant to §455(e), or if a party has independent knowledge of those facts and fails to make a timely motion to disqualify, that party will be deemed to have waived §455(a) disqualification. *E.g., Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982). Section 455(e) forecloses the parties from waiving §455(b) disqualification. Under either §455(a) or (b), a judge's decisions will stand unless the objective evidence establishes that the judge was disqualified by reason of an appearance of partiality or by the existence of facts that mandatorily disqualify him.

Because Judge Collins was disqualified under §455(a) and (b), the Fifth Circuit judgment should be affirmed.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY VACATED JUDGE COLLINS' JUDGMENT FOR DISQUALIFICATION UNDER §455(a)

A. The Statutory Scheme Of §455

Section 455 establishes the criteria for disqualification of federal judges and codifies the ethical duties imposed on judges by Canon 3C of the Code of Judicial Conduct.[3] In converting judges' ethical obligations into statutory duties, Congress adopted the intent of the draftsmen of Canon 3C.[4]

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[3] The 1974 revision of §455 was intended to "make the statutory grounds for disqualification of a judge in a particular case conform generally with a recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice, or conflict of interest." H. Rep. No. 93-1453, 93d Cong., 2d Sess. reprinted in [1974] U.S. Code Cong. & Ad. News 6351. Hereafter "H. Rep."

Before Congress rewrote §455, the Judicial Conference of the United States, in April 1973, adopted the Code, making it applicable to all federal judges. *Id.* at 6356.

[4] "Much of the history surrounding the intent of the language employed in this bill derives from the action of the ABA Committee and is contained in the testimony given by the chairman and reporter for that Committee. . . ." *Id.* at 6356. Members of the ABA Committee included former Chief Justice Roger J. Traynor of the California Supreme Court, Chairman; Justice Potter Stewart, Judge Irving R. Kaufman and Judge Edward T. Gignoux. The Reporter for the Committee was Professor E. Wayne Thode. *Id.* at 6352.

Congress adopted the Committee's interpretation of the provisions for judicial disqualification, including the interpretation of its draftsmen, with two exceptions relating to waiver of disqualification. First, the Canons formerly required disqualification in all circumstances where the judge's impartiality might reasonably be questioned," but §455(e) permits waiver of disqualification if "it is preceded by a full disclosure on the record of the basis for disqualification." Second, the Canons formerly permitted waiver of insignificant financial interests after full disclosure by the judge and other expressed conditions, but §455(e) forbids "a waiver of any ground for disqualification enumerated in subsection (b)." Canon 3D was amended in 1979 to conform to the waiver provisions of §455(e).

[5] H. Rep. at 6355.

[6] *Ibid.* "Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." E. W. Thode, *Reporter's Notes to Code of Judicial Conduct* (1973) p. 60, hereafter "*Reporter's Notes.*"

Section 455(b) states specific facts that mandatorily disqualify a judge; section 455(e) forecloses waiver of disqualification under §455(b). The history of §455(a) and Canon 3C(1) on which it was based is explicit that the subsection is a "catch-all provision" setting up an objective standard "designed to promote public confidence in the impartiality of the judicial process. . . ." [5] Section 455(a) was intended to prevent the appearance of partiality and to impose "an objective standard, rather than the subjective standard set forth in the existing [pre-1974] statute through the use of the phrase 'in his opinion.' "[6] If a judge has disclosed the potentially disqualifying facts on the record, §455(e) permits the parties to waive §455(a) disqualification.

The statute imposes mandatory duties on a judge to keep himself informed of his personal and fiduciary financial interests (§455(c)), to disclose potentially disqualifying facts on the record before accepting a waiver of §455(a) disqualification (§455(e)), and to recuse himself when facts exist that *per se* disqualify him (§455(b)) or create an appearance of impropriety (§455(a)). The statute imposes no duties on the litigants.

The knowledge component of §455 is directed to the judge's performance of his mandatory statutory duties and not to the existence of objective facts requiring his disqualification. Thus, a judge who owns a $10,000 stock interest in a party is mandatorily disqualified by §455(b)(4) whether or not he remembers his interest because the judge is required to know his personal financial interests. It is the fact of his stock interest that disqualifies him and not the state of his mind. Judicial amnesia may excuse the judge from his breach of his duties to keep himself informed and to recuse himself, but it does not remove disqualification.

If the law imposes no duty on a judge to know a disqualifying fact, he is not *per se* disqualified unless he has actual knowledge of the fact or the evidence is sufficient to charge him with such knowledge. For example, §455(c) does not require a judge to know his spouse's financial interests.[7] If the judge's wife owns a $10,000 stock interest in a party, her interest does not disqualify him under §455(b)(4) unless he knows of her interest. He nevertheless will be disqualified under §455(a) if the fact of her interest would lead a reasonable person to doubt the judge's impartiality. His lack of knowledge would excuse his failure to recuse himself, but it does not remove §455(a) disqualification.

[7] "Canon C(2) requires a judge to *know* what his personal and fiducial financial interests are, but he is required to make only a reasonable effort to learn of the financial interest of his spouse and minor children residing in his household." *Reporter's Notes* at 86. (Emphasis in original.)

B. Judge Collins' State Of Mind Is Not In Issue Under §455(a)

Section 455(a) says nothing about knowledge. Congress did not intend to put the judge's state of mind in issue on a party's motion to disqualify him. Congress' intent to substitute an objective for the prior subjective test of former §455 would be defeated if disqualification turned on the judge's actual mental processes.

Petitioner's argument that the Fifth Circuit "retroactively" disqualified Judge Collins rests on the erroneous premise that disqualification does not arise until the judge has actual knowledge of the disqualifying facts. The objective facts established that Loyola University had a substantial financial interest in the controversy pending before Judge Collins and that he was a fiduciary of the University. Because a reasonable person would question the propriety of Judge Collins sitting on the case, §455(a) disqualified him. That Judge Collins forgot his earlier actual knowledge of Loyola's interest is not material to his disqualification; forgetfulness is relevant only to his chargeability with breach of his statutory duties to keep himself informed of his fiduciary interests and to recuse himself.

Section 455(a) disqualification turns on the objective facts as viewed by a hypothetical reasonable observer; the judge's actual state of mind is invisible to the observer. Congress' intent to substitute an objective for the prior subjective test of §455 would be defeated if disqualification turned on the judge's thoughts. Moreover, to read an actual knowledge element into §455(a) would thwart Congress' purpose to preserve the impeccability of the reputation of the federal judiciary because no matter how questionable the objective facts would appear to an objective observer, the parties

could not disqualify the judge if he testified, "I did not know," or "I forgot," and his testimony was credited.

The intent of the draftsmen of Canon 3C(1), accepted by Congress in §455(a), was to codify the concept of "appearance of justice" described in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968).[8] This Court vacated a judgment on due process grounds because a judge had undisclosed financial dealings with one of the parties. No inquiry into the actual state of a judge's mind was deemed material.[9] Although disqualification was based on constitutional grounds, the same result should follow under §455(a) because Congress intended to adopt disqualification for improper appearances without inquiry into the judge's mind.

C. If §455(a) Requires Knowledge, Constructive Knowledge Is Sufficient To Disqualify

Even if a knowledge element from §455(b) were read into §455(a), Judge Collins was nevertheless disqualified. He had

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[8] *Reporter's Notes*, p. 60.

[9] This theme was re-echoed in *Aetna Life Ins. Co. v. LaVoie*, — U.S. —, 106 S.Ct. 1580, 89 L.Ed.2d 823, 835 *supra*:

> "We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true.' [Citation.] The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice" '[citation]."

a statutory duty to know that he owned a fiduciary financial interest in the subject matter of the controversy under §455(b)(4) and §455(c). He is deemed to know those facts that the statute requires him to know, and he will not be heard to deny his knowledge. Moreover, as a fiduciary of Loyola University, he was under a legal duty to have knowledge of its substantial financial interests, including its interest in the outcome of the controversy before him. The objective evidence established that he had actual knowledge of the facts both before and after he tried the case. Under these circumstances, he will not be heard to say that he had no knowledge because he forgot the facts in the interim. (*See discussion infra*, pp. 19-20).

Petitioner's arguments attacking vacation of the judgment for §455(a) disqualification may become moot because Judge Collins was mandatorily disqualified by 28 U.S.C. §455(b), to which NEC now turns.

II. JUDGE COLLINS WAS MANDATORILY DISQUALIFIED BY 28 U.S.C. §455(b)(4)

On the first appeal, Respondent argued unsuccessfully that Judge Collins, as a trustee of Loyola, had a *per se* disqualifying fiduciary financial interest in the subject matter in controversy.[10] In its first unpublished opinion, the Fifth Circuit held that Loyola's interest in the real estate transaction was exempted by §455(d)(4)(ii), excluding "securities" held by educational institutions. The holding was plainly wrong because Loyola's real property interest

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[10] Section 455(d)(3) defines "fiduciary" expressly to include trustees; §455(d)(4) defines "financial interest" to include the relationship of a "director, advisor, or other active participant in the affairs of" an educational or religious organization that is a party.

was not a "security" within the meaning of the exemption.[11] On the second appeal, the Fifth Circuit refused to reconsider the issue stating that it accepted the conclusion "for the purposes of this opinion without analysis of its validity or precedential effect." 796 F.2d at 800, n. 1.

The Fifth Circuit also declined to decide whether §455(b)(4) disqualified Judge Collins because he owned an "other interest that could be substantially affected by the outcome of the proceeding." Its refusal to decide the question of disqualification under the "other interest" provision of §455(b)(4) was based on two erroneous assumptions: (1) §455(b)(4) requires proof that the judge had actual rather than imputed knowledge of disqualifying facts before he is mandatorily disqualified, and (2) the judge's decisions are valid before he acquires actual knowledge even if he then held a disqualifying financial or "other" interest. 796 F.2d at 801-802.[12]

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[11] Congress intended the exemption to apply to securities in an educational institution's portfolio; there was no intention to exempt other kinds of financial interests of such organizations. As the draftsmen of Canon 3C explained:

"[T]he financial interest of such an organization in securities held by it in a party is not an interest attributable to the judge that will disqualify him, unless of course in the particular case the interest and his connection with it bring into play the broad test of Canon 3C(1) that 'his impartiality might reasonably be questioned.' . . . Were it not for the distinction drawn by two subsections under discussion, the fiduciary disqualification standard as a practical matter would preclude judges from being trustees of any type of 'public' institution with an investment portfolio. As a matter of policy, the Committee was not willing to do this." *Reporter's Notes, supra*, p. 69.

Loyola's interest was not in stocks and bonds, but in real estate. It had a substantial financial interest in the outcome of the litigation.

[12] The Fifth Circuit's reliance on *In re Cement and Concrete Antitrust Litigation*, 515 F.Supp. 1076 (D. Ariz. 1981), *appeal dismissed*, 673 F.2d 1020 (9th Cir.), *appeal dismissed*, 459 U.S. 961, 103 S.Ct. 285, 74 L.Ed. 2d 272, *mandamus denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for absence of a quorum*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed. 2d 425 (1983) ("*Concrete Antitrust Litigation*") was misplaced. The judge did not rule while he was disqualified; he recused himself when the identities of the unnamed parties in which his wife had a stock interest were revealed.

A. Section 455(b) Does Not Require Actual Knowledge Or Conscious Awareness Of Disqualifying Facts

The Fifth Circuit erroneously assumed, as does the Petitioner,[13] that §455(b) does not mandatorily disqualify a judge until he has actual knowledge that he owns a disqualifying interest.

Section 455(b)(4) compels disqualification when a judge:

> "knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding[.]"

The quoted provision must be read with §455(c) and §455(d)(4) defining the term "financial interest." Section §455(c) states:

> "A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

Despite the use of the word "should" instead of "shall," the history of Canon 3C(2) and of §455(c) clearly

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[13] PB 27-28.

establishes the intent that the judge must know his personal and fiduciary financial interests.[14]

The draftsmen of the Canon and the statute intended the knowledge of the judge to be in issue only when disqualification is based on facts that the Canons, the statute, and other laws do not require the judge to know.[15] The judge's knowledge of the interests that he is required to know is presumed as a matter of law in order to comply with the congressional intent. With respect to those interests that he is not compelled to know, proof of facts sufficient to put a judge on notice of his disqualifying interest satisfies the knowledge element of §455(b)(4), without proof that the

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[14] "Canon C(2) requires a judge to *know* what his personal and fiducial financial interests are, but he is required to make only a reasonable effort to learn of the financial interests of his spouse and minor children residing in his household." *Reporter's Notes* at 86. (Emphasis in original.) The preface to the Canons states: "The Canons and text establish mandatory standards unless otherwise indicated." Chief Justice Traynor and Professor Thode both testified that the intent was to impose a mandatory duty on the judge to inform himself of those interests. Hearings on S.1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (May, 1973) (hereafter "S. Hearings on S.1064") p. 99. Hearings on S.1064 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 93d Cong., 2d Sess. (1974) (hereafter "House Hearings") p. 16.

[15] As Professor Thode testified before the Senate Judiciary Committee: "I have already pointed out how the judge does not have to know of the financial interests of a spouse and minor children, but only has to make a reasonable effort to learn of these things [under subdivision (b)]. As to other relatives, the code does not require that a judge make any effort to find out, if he does not know, that a relative has an interest in the party or the subject matter even though it is an interest that could be substantially affected by his decision. Knowledge of such an interest would disqualify him, but he doesn't have to search out the knowledge or make a reasonable effort to get it . . . ." S. Hearings on S.1064, p.104.

judge had "conscious awareness" of that fact when he was trying the case.

During the House hearings, Chief Justice Traynor was asked about the effect on a judge's rulings if he did not have actual knowledge of his own financial interests, despite his duty to know them. Chief Justice Traynor responded:

> "It would be my judgment that where his disqualification was for financial interest, *and he did not keep track of his interests* . . . would raise a serious question as to whether the judgment would be subject to collateral attack. . . . I think there is strong support for the proposition of a judge who sits in violation of the financial interest *disqualification would subject this judgment to collateral attack.*" (Emphasis added.) House Hearings at 16-17.

Mr. John Frank testified in a similar vein, concerning the effect of §455(c) read with §455(b):

> "This provision requires the judge to be informed about his own personal financial interest. . . . Some people hold a wide number of stocks, or maintain portfolios in which there may be considerable turnover. There exists the possibility of disqualification in fact where the judge does not know that he has a particular investment. I read this provision to be virtually a requirement that those judges who have extremely disbursed holdings must make an effort to consolidate them; *they will not be excused for failing to know what they have.*" (Emphasis added.) [16]

The draftsmen of the Canons refused to permit a judge to avoid disqualification by the use of a blind trust. The

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[16] House hearings at 13.

Committee decided that the public and the litigants would be skeptical that the trust had in fact been blind and, as Professor Thode explained:

> "The Committee decided that he must know about his interests so that he can thereby disqualify himself rather than using this blind trust."[17]

Congress rejected the minority view that a judge should not be disqualified under §455(b) if the financial interest was insubstantial or the judge had forgotten about it when litigation came before him implicating that interest.[18]

At a minimum, Canon 3A requires the judge to know the identity of the named parties before him and the subject matter of the controversy. It does not require him to make an independent investigation to ascertain the identity of unnamed parties in a class action or independently to discover mergers or acquisitions that affect the status of parties. He is not disqualified until those facts are revealed on the record by the parties.[19]

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[17] S. Hearings on S.1064, pp. 101-102.

[18] Representative Dennis expressed the minority view pressing for a more flexible standard:

"The necessary effect of this inflexible provision is that, by legislative enactment, we could have a true Daniel come to judgment . . . and if the case involved, let us say the Exxon Corporation, and the judge owned 20 shares of common stock, which he had inherited from his parents many years before and had never particularly thought of since, he absolutely could not sit, even though both parties to the cause preferred him — because of his expertise, learning, and integrity — to any and all other available members of the judiciary.

"To me, an inflexible provision of this kind does not make good sense, does not make for the highest quality of justice, and represents an overreaction to a problem which, so far as the Committee has been advised, is largely non-existent." H. Rep. at 6363.

[19] *E.g.*, a judge has no duty to discover the identity of all of the unnamed members of a class in a class action. His ownership of a financial interest in an unnamed member of the class does not disqualify him. However, he is disqualified from the moment a class member is named in which he owns a financial interest. *Concrete Antitrust Litigation, supra*, n. 12, (no disqualification for spouse's stock in 7 members of 210,000 person class action until such members identified by parties); *Union Carbide, Corp. v. U.S. Cutting Service*, 782 F.2d 710 (7th Cir. 1986) (no disqualification for spousal interest in unnamed class member until identification); *Hodash v. Block Drug Co., Inc.*, 790 F.2d 880 (Fed. Cir. 1986) (a member of panel not disqualified by stock ownership in corporation acquiring a party when acquisition not disclosed until after decision).

The legislative history is thus clear that the draftsmen of the Canon and §455(b) intended to require proof that the judge had actual knowledge only of those financial interests that he was not duty bound to know. Nevertheless, some lower courts have interpreted the word "know" in §455(b) to require proof that a judge has actual knowledge or "conscious awareness" of his personal and fiduciary financial interests at the very time he made the challenged decisions before he is mandatorily disqualified under §455(b)(4). None of the opinions reaching that conclusion discuss the impact of §455(c) or the pertinent legislative history of the knowledge component of §455(b)(4). Each of them manifests reluctance — even hostility — to disqualify a judge who fails to keep track of what he owns or who forgets his financial interests when a case comes before him implicating those interests.[20]

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[20] The Fifth Circuit did not reach this issue on the second appeal because it refused to reconsider the error in the first appeal holding that Loyola's interests was a "security" exempted by §455(d)(4)(ii) as a financial interest. Because §455(c) does not require a judge to know interests other than his personal and fiduciary interests, a judge is not disqualified under §455(b)(4) unless there are objective facts to support a finding of his actual knowledge, or statutes other than §455 or the common law impose a duty of knowledge upon him.

Two cases are illustrative: *Davis v. Xerox*, 811 F.2d 1293 (9th Cir. 1977) and *NEC v. Intel, supra*, 654 F. Supp. 1256. In *Davis*, the judge knew that he had a small personal financial interest in Xerox, but he had forgotten about it when the case was assigned to him. After the judge made several pre-trial rulings, he recalled the interest and recused himself. The case was tried on the merits before another judge. On appeal, the Ninth Circuit refused to vacate the first judge's pre-trial rulings because he held a mandatorily disqualifying interest. It held that the judge was not disqualified because he did not then "know" the disqualifying fact.[21]

In *NEC*, the District Court held that the first judge was not disqualified by §455(b)(4) despite his ownership of a personal financial interest in one of the parties. Although the Court assumed he knew that he had a financial interest in Intel and although Intel was the sole named party defendant, he did not consciously connect the two pieces of information. Therefore he did not have actual knowledge of his disqualification until the facts were brought to his attention by a motion to disqualify him. Accordingly, the District Court concluded, the first judge was not disqualified and his rulings prior to the motion could not be set aside.

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[21] In stating and applying its "forgetful judge" test, the Ninth Circuit introduced a negligible financial interest concept that Congress itself had flatly rejected when it decided that a judge's personal financial interest, no matter how small, *per se* disqualified him. H. Rep., pp. 69-70. The Ninth Circuit said: "If the circumstances are such that a reasonable person would conclude that the judge had not forgotten but continued to know, his rulings must be vacated. . . . On the other hand, where the financial interest is substantial or appears to have had the potential of affecting the judge's rulings, the interest will be one that reasonable persons would conclude the judge was aware of, whatever his pretense of ignorance." 811 F.2d at 1296.

Both *Davis* and *NEC*, like the opinion below, do violence to Congress' purpose in enacting §455(b)(4).

B. A Judge Is Presumed To Know The Facts That The Statute Requires Him To Know

Because Judge Collins was statutorily required to know his personal and fiduciary financial interests, knowledge of those interests is presumed. The principle is well established that when the law requires a person to know a fact, he will be deemed to know it. Thus, for example, in *King v. United States*, 379 U.S. 329, 85 S.Ct. 427, 13 L.Ed.2d 315 (1964) the president of a debtor corporation in Chapter XI proceedings was held personally liable to the government because he paid non-priority creditors without paying the superior government claim. He was not aware of the government's claim, and he erroneously believed in good faith that the assets were sufficient to pay the creditors. As president of the corporation and as its representative in the bankruptcy court, he had a duty to know the available assets of the debtor and the existence of the government's claim. He was not heard to say that he was, in fact, ignorant; his actual state of mind was irrelevant. (*See also*, White, J., concurring specially, 379 U.S. at 340-43, 85 S.Ct. at — , 13 L.Ed at 322-323.

Whether the principle is stated as a presumption, a species of estoppel, or constructive knowledge, it is a means by which a person will not be permitted to deny knowledge which the law says he shall have. As this Court said in *DeCordova v. Hood*, 17 Wall. (84 U.S.) 1, 4, 21 L.Ed. 587, 589 (1873): "Wherever inquiry is a duty, the party bound to

make it is affected with knowledge of all which he would have discovered had he performed the duty."[22]

Congress imposed the duty on Judge Collins to know his fiduciary financial interests; as a trustee of Loyola, he also had the duty to know the assets of Loyola. Those assets included the substantial financial interest that Loyola had in litigation before him. Under these circumstances, Judge Collins is chargeable with knowledge of that interest, and he will not be heard to deny his knowledge. His failure to remember the transaction may relieve him of breach of his ethical and statutory duties to have recused himself, but his memory lapses do not cure his mandatory disqualification under §455(b)(4).

C. Judge Collins Had A Disqualifying "Other Interest"

Loyola's interest was unquestionably substantially affected by the outcome of the lawsuit. As the Fifth Circuit recognized, Judge Collins' trusteeship gave him an "other interest" within the meaning of §455(b)(4), even if it were exempted as a "financial interest." The Fifth Circuit did not disqualify Judge Collins on that ground because it erroneously concluded that a judge who has forgotten a disqualifying fact does not "know" the fact within the meaning of §455(b)(4).

Although §455(b) and (c) do not compel a judge to know that he has an "other interest," if he does "know" about the

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[22] *Accord*: In re *Gottheiner*, 703 F.2d 1136, 1141 (9th Cir. 1983) (corporate officer and director presumed to know corporate indebtedness). *See generally*, E. Johnson & K. Weeks, "To Save a College: Independent College Trustees and Decisions on Financial Exigency, Endowment Use and Closure," 12 *J. College and University Law* 455, 458-59.

interest, he is disqualified.[23] The question is whether Congress intended to remove *per se* §455(b)(4) disqualification if a judge knew the disqualifying facts, but forgot them while he was trying a case involving that interest even though he was duty bound to keep the facts in mind.

Congress rejected the minority view that a judge should not be disqualified who had forgotten an insubstantial financial interest in a party or the subject of the controversy.[24] If temporary memory lapses were permitted to remove §455(b)(4) disqualification, Congress' intent to impose *per se* disqualification and its overriding purpose of protecting the reputation of the judiciary would be seriously impaired. Public confidence in the federal judiciary is not enhanced by permitting forgetful judges to sit on cases that substantially affect persons with whom the judge has a fiduciary relationship.

It is not edifying to require a judge to testify under circumstances that test his credibility. If a judge's testimony on a disqualification motion (if needed at all) is limited to the objective facts, the existence of the judge's knowledge can be ascertained without any direct evidence from the judge about his mental processes. The evidence was more than ample to support a finding that Judge Collins knew about Loyola's interest in the lawsuit. Frailty of memory is a common human attribute, but it does not excuse the forgetful person from being charged with knowledge of facts that he once knew and that he was legally required to keep in mind.

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[23] Note 15, *supra*, p. 14.

[24] Note 18, *supra*, p. 16.

III. VACATION OF JUDGE COLLINS' JUDGMENT IS THE APPROPRIATE REMEDY

Vacation of the decisions of a disqualified judge is the appropriate remedy; indeed, it is the only remedy when, as here, a judgment has become final before the party discovers the disqualifying facts. *Hall v. Small Business Administration, supra*, 695 F.2d 175. *Cf. Aetna Life Ins. Co. v. LaVoie, supra* — U.S. at — , 106 S.Ct. at — , 89 L.Ed.2d at 836-37; *Potashnick v. Port City Construction Co.*, 609 F.2d 1001 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

The statements from *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) and its progeny, upon which Petitioner relies, cannot withstand analysis:

> "Judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts." *Id.* at 1541.

The *Murphy* court's attempted distinction between the effect of disqualification based on an appearance of impropriety (§455(a)) and disqualification based on actual prejudice (§455(b)(1) (judge disqualified "where he has a personal bias or prejudice concerning the party")) cannot be reconciled either with the statute or Congress' intent in enacting it. Congress distinguished the effect of disqualification under the two subsections in only one respect: §455(e) forbids an acceptance of the parties' waiver of §455(b) disqualification, but permits waiver of §455(a) disqualification after the judge has disclosed the relevant facts on the record. The *Murphy* court's distinction would impose a waiver on §455(a) disqualification despite judicial failure to disclose such facts on the record and

absence of evidence that the moving party had any pre-existing independent knowledge of those facts. The court's approach violates the waiver provisions of the statute, violates rudimentary principles governing the application of waiver or estoppel, and assumes that the parties have a non-existent duty to discover disqualifying facts.

Disqualification of the judge is not affected by a party's discovery of the facts. When such facts arise, a party's claim for relief from the decisions of a disqualified judge "accrues". The statute imposes no duty on the parties to seek evidence of disqualification. To the extent that the statute places a discovery burden, it is imposed on the judge. A party's earlier discovery of the facts is material only with respect to the existence of an express or implied waiver of §455(a) disqualification. Thus, if the record reveals that a judge has disclosed the pertinent facts before he rules, or if a litigant had independent knowledge of those facts and failed timely to move for disqualification, that party is deemed to have waived disqualification under §455(a).[25]

The vacation remedy is no more "retroactive" than an ordinary reversal of an erroneous judgment. If disqualifying facts arise after the judge has made decisions in a case, his prior decisions are not subject to vacation. For example, in *Union Carbide, Inc. v. U.S. Cutting Service, supra*, 782 F.2d 710, the judge had been trying the class action for months before she married a man who had stock interests in two of the unnamed class members. Because no class list was available, she had no way of knowing that her husband's interests were related to the case before her.

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[25] *E.g., Delesdernier v. Porterie, supra*, 666 F.2d 116; *United States v. Noble*, 696 F.2d 231 (3d Cir. 1982). *See United States v. Conforte*, 624 F.2d 869, 878-82 (9th Cir. 1980). Under such circumstances, neither a reversal or vacation on direct appeal nor a vacation following a collateral attack is available.

When she discovered the connection, she transferred the case to another judge. She did not resume control of the case until her husband sold the stock. Because she made no rulings while she was disqualified, her decisions were valid. If her decisions while she was not disqualified had been set aside, disqualification would have been retroactive.[26] In contrast, Judge Collins was always disqualified, and no retroactivity is involved in vacating the judgment.

Petitioner's argument that disqualification occurs only after a party moves to disqualify the judge cannot be reconciled with the statutory scheme because Petitioner cannot explain how the congressional purpose of protecting the reputation of the federal judiciary could be achieved if a judge's decisions are permitted to stand (without any waiver of disqualification) when the objective facts cast doubt on the impartiality of the judge.[27]

Vacation of a judgment or other decision of a judge disqualified by §455(a) does not raise the specter of abuse. Vacation never occurs unless a court decides that the objective facts created an appearance of impropriety or the judge had a *per se* disqualifying interest. Vacation of rulings or judgments for disqualification are very rare. The vacation remedy imposes no greater burden on the litigants

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[26] *See also* cases cited n. 19, p. 17 *supra*.

[27] Petitioner's reliance on 28 U.S.C. §144 is misplaced. PB 15-16. The rulings of a judge, challenged under §144, stand until the judge either disqualifies himself or a court disqualifies him. If the judge is disqualified for bias and prejudice, the Due Process Clause would require vacation of his decisions. *E.g., In re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955). *But see, Aetna Life Ins. Co. v. LaVoie, supra*, — U.S. at —, 106 S.Ct. at —, 89 L.Ed.2d at 831-32. In enacting §455, Congress intended to impose more rigorous disqualification standards than the Constitution compels, as *Aetna* recognizes it is entitled to do. — U.S. at —, 106 S.Ct. at —, 89 L.Ed.2d at 837.

than an ordinary reversal with a remand for a new trial. In both situations, the former winner loses the initial fruits of his victory, and in both, all of the parties must bear the costs of retrial.

Congress recognized that the results could be harsh in particular cases, but it decided that the price must be paid to assure the integrity of the federal judicial system.[28]

CONCLUSION

Judge Collins was disqualified by §455(a) and §455(b)(4) from the threshold of the case. Accordingly, the Fifth Circuit's judgment disqualifying him and vacating the district court's judgment should be affirmed.

Respectfully submitted

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[28] H. Rep. 6361.

AMICUS CURIAE

BRIEF

No. 86-957

Supreme Court, U.S.
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JUL 23 1987
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CLERK

In The

Supreme Court Of The United States

October Term, 1986

JOHN A. LILJEBERG, JR.,
Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICI CURIAE KENNETH W. DAVIS, JR., ET AL

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No. 86-957

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN A. LILJEBERG, JR.,

Petitioner,

v.

HEALTH SERVICES ACQUISITION CORP.,

Respondent.

BRIEF FOR AMICI CURIAE KENNETH W. DAVIS, JR., ET AL

I. *STATEMENT OF INTEREST OF AMICI CURIAE*

Kenneth W. Davis, Jr., Kay Davis, Alana Lawler and A.T. Davis ("Davises" or "Amicus" hereafter) appear in this Court as amici curiae based on written consent of Petitioner and Respondent (see letters of consent accompanying briefs per instructions of Clerk's Office) pursuant to Rule 36.2 of the Rules of the Supreme Court. The Davises appear in support of Respondent herein and in support of the decision and opinion of the U.S. Court of Appeals for the Fifth Circuit in *Health Services Acquisition Corporation v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, 107 S.Ct. 1368 (1987) (*"Health Services"* hereafter).

The Davises are majority equity owners of Kendavis Holding Company ("KHC"). KHC was a debtor-in-possession in a bankruptcy case pending in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division. On November 24, 1986, the bankruptcy judge entered an order confirming a plan of reorganization which, *inter alia*, cancelled the Davises' equity. The Davises and others appealed to the U.S. District Court. While the appeal was pending, the bankruptcy judge

revealed that he owned common stock in J.P. Morgan Company, Inc., the holding company for Morgan Guaranty Trust Company ("Morgan Guaranty"). Morgan Guaranty was a substantial creditor, member of the Official Creditors' Committee, signatory to the original involuntary petition in bankruptcy, proponent of the confirmed plan, active participant in the bankruptcy proceedings, and a party in interest under 11 U.S.C. §1109 (1979). The U.S. District Court affirmed the order confirming the plan a few days after the bankruptcy judge revealed this financial interest. The Davises promptly moved in the U.S. District Court to vacate the bankruptcy court order confirming the plan based on 28 U.S.C. §455 (1968). The district court denied the motion to vacate and the Davises appealed to the U.S. Court of Appeals for the Fifth Circuit. This appeal was expedited by the Fifth Circuit and orally argued June 3, 1987.[1] A decision was still pending on July 16, 1987.

Each of the questions on which a writ of certiorari was granted by this Court in *Liljeberg, v. Health Services Acquisition Corp.* (86-957), are directly pertinent to the Davises' appeal in which the Davises rely on the Fifth Circuit decision being reviewed herein. Although other issues are present in the Davises' Fifth Circuit appeal which may be decisive if determined adversely to the Davises, a reversal of the Fifth Circuit opinion in *Health Services* will likely terminate major aspects of the Davises' appeal, if not the entire appeal.

In particular, the Davises have direct interest in the issues of whether a judge is disqualified pursuant to 28 U.S.C. §455

1. *K.W. Davis, Jr. v. The Official Unsecured Creditors' Committees (In re Kendavis Industries International, Inc.) appeal docketed*, No. 87-1251 (5th Cir. 1987). The remaining equity owners of KHC are each also Davis family members or trusts affiliated with the family. All are appellants in the pending Fifth Circuit appeal.

because of constructive knowledge of a disqualifying interest, and, if so, can relief be obtained from judgments or orders entered by such a judge while such disqualifying factors were present.

II. *SUMMARY OF ARGUMENT*

Under 28 U.S.C. §455 a judge shall disqualify himself where his impartiality might reasonably be questioned including situations where he knows he has an interest which might be substantially affected by the outcome of the proceeding. The legislative history of the 1974 amendments to Section 455 indicate that a primary congressional purpose was to assure public confidence in the impartiality of the judiciary. Where a reasonable person might believe from the facts and circumstances that a judge knew that he had an interest in the outcome of the proceeding, even if the judge might in fact have forgotten about his interest, that judge is disqualified because he should know he had an interest and because his impartiality might reasonably be questioned.

Judge Collins was a member of the Board of Trustees of Loyola University which had an interest in the outcome of the instant proceeding. Judge Collins had actual knowledge of this interest prior to the trial and entry of judgment. Although Judge Collins had forgotten about this interest at the time of trial and entry of judgment, he had constructive knowledge of that interest and cicumstances existed such that a reasonable person would conclude that the judge knew of his interest.

Where a judge has a disqualifying interest which is not discovered until post-judgment, the judgment must be vacated in order to effectively protect the interests of the public and the losing litigant in their confidence in the impartiality of the judiciary. Vacation is the necessary remedy provided that a motion to vacate is made reasonably promptly after discovery of the disqualifying facts.

III. *ARGUMENT*

A. *Introductory Statement*

On remand from the Fifth Circuit, the U.S. District Court, Judge Charles Schwartz, Jr., conducted an evidentiary hearing based on depositions, exhibits and memoranda. *Health Services Acquisition Corp. v. Liljeberg*, No. 81-4714, slip op. 1 (E.D. La. 1985), Appendix to the Petition for Writ of Certiorari at Pet. App. 14a. From this hearing, the district court concluded that Judge Collins did not have actual knowledge, at the time of the trial or the entry of the judgment, that Loyola University was negotiating the sale of certain property to Liljeberg or that Liljeberg's ownership of a state certificate of approval to construct a hospital would be beneficial to Loyola. Pet. App. 24a-25a. The district court nevertheless found that:

> ... there was available to the Judge information regarding the sale of the Monroe tract and the fact of Loyola's negotiations with Liljeberg, and more significantly, the import of the ownership of the certificate to Loyola. Thus, even though Judge Collins would have recused himself upon any questioning of his impartiality ... the availability of such information to him as a Board member and his involvement in routine meetings and recommendations involving same are sufficient to charge him with constructive knowledge of the sale to Liljeberg and the sale's potentially favorable impact on other Loyola property, assuming Liljeberg would construct the St. Jude Hospital on that tract if the certificate of need was at his disposal.

Pet. App. 30a-31a. Finally, the court found that prior to the trial or entry of the judgment, Judge Collins "had actual knowledge of Loyola's potential interest" but "due to his lack of recollection, ... [he] did not have actual knowledge on [the dates of trial] and at all times thereafter, while he controlled the outcome of the case." Pet. App. 29a, n.12. In essence, prior to trial and entry of judgment, Judge Collins had heard reports of

and read minutes concerning the pertinent facts of Loyola's negotiations with Liljeberg, and the benefit to Loyola if Liljeberg acquired the certificate of approval, had forgotten this at the time of trial, reacquired "actual knowledge" shortly after the entry of the judgment, but did not bring these facts to anyone's attention. After the appeal became final, Respondent discovered that Judge Collins had this interest and promptly moved to vacate. When the motion to vacate was denied by Judge Collins and the case was remanded by the Fifth Circuit, Judge Schwartz also denied the motion to vacate.

The Fifth Circuit reversed the district court and ordered the original judgment entered by Judge Collins vacated. *Health Services*, 796 F.2d at 803. The circuit held that the finding that Judge Collins lacked actual knowledge during the pertinent litigation periods was not clearly erroneous, *id.* at 801, but that the finding of constructive knowledge at all times disqualified Judge Collins since it created a basis on which "his impartiality might reasonably be questioned" under 28 U.S.C. §455(a). See *id.* at 803 ("... an objective observer would firmly expect that Judge Collins would have actual knowledge of Loyola's interest in the case.") So finding, the Fifth Circuit concluded that vacation of a judgment rendered by a disqualified judge was necessary to assure compliance with the injunction of 28 U.S.C. §455(a) to avoid the appearance of partiality. *Id.* at 802 ("The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality.")

The questions presented to this Court are whether the objective appearance that a judge knows of his disqualifying interest creates a reasonable basis for questioning his impartiality, and, if so, should orders entered by such a judge while holding such an interest be vacated when the actual situation is not discovered until after the challenged orders have become final.

B. *Where The Objective Facts Impute Knowledge To A Judge Of A Disqualifying Interest, There Is A Reasonable Basis To Question The Judge's Impartiality*

1. *Twenty-eight U.S.C. §455 Focuses on Public Perceptions.* Two overlapping concerns motivated Congress in 1973 and 1974 to enact S. 1064, 93d Cong., 1st Sess. (1973), which rewrote 28 U.S.C. §455. Congress wanted to tighten the standards for disqualification of federal judges where public confidence in the impartiality of the judiciary needed strengthening and to avoid the risk that a judge's slight interest in litigation might violate the Fifth Amendment guarantee of due process of law.

Possessing "neither the purse nor the sword"[2] the authority of courts

> rests ultimately on public acceptability of judicial decision making. That acceptability depends in turn on a belief in the impersonality and reasoned foundation of judicial decisions. Such a belief is, of course, undermined when judicial decisions may be closely identified with the interests or prejudices of the decision makers themselves. (footnotes omitted)

Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 746-47 (1973) (*"Harvard Note"* hereafter). Protecting public confidence in the impartiality of judicial decision making was a paramount concern.

In the wake of the United States Senate's refusal to confirm the nomination of Circuit Judge Clement Haynsworth to the United States Supreme Court because, in part at least, of disclosures that on several occasions he participated in decisions in which he held stock in a party or in a corporation which was a substantial creditor of a party, the American Bar Association in 1972 replaced the *Canons of Judicial Ethics* by the *Code of*

2. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

Judicial Conduct (*"A.B.A. Canons"* hereafter). The new *A.B.A. Cannons* were adopted by the Judicial Conference of the United States in April 1973 as the *Code of Judicial Conduct*. These Cannons formed the basis for the 1974 amendment to 28 U.S.C. §455.[3]

Congress was, of course, concerned with improper influences which actually affect the impartial administration of justice. But perhaps of paramount importance, because of greater occurrence and subtlety, were concerns about matters which might create such influences or which were commonly perceived to create such influences and thus undermine public confidence - both of which were to be avoided by requiring judicial disqualification based on objective appearances. Throughout the legislative history the theme is the promotion and protection of public and litigant confidence that judicial decisions are as impartial as humanly possible. After all, the ethical concerns noted in connection with the Haynsworth confirmation did not involve *any* evidence or accusation of actual favoritism by the judge because of his financial interests.[4] The *appearance* to others of possible partiality was the focus of these criticisms.

S.1064 was enacted to bring the ethical rules of the *A.B.A. Cannons* and the statutory requirements closer and is based upon Canon 3C of the *A.B.A. Canons*.[5] Canon 3C(1) is

3. See *Harvard Note*, and H. Rep. No. 93-1473, 93d Cong. 2d Sess. 1 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News p. 6,351 (*"House Report"* hereafter).

4. See Sen. Executive Rep. No. 91-12, 91st Cong., 1st Sess. (1969) (individual views beginning at p. 40).

5. *Judicial Disqualification: Hearing on S.1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93d. Cong. 1st Sess. 73 (1973) (*"Senate Hearings"* hereafter); *House Report*, p. 1; *S.Rep.* No. 93-419, 93d. Cong. 1st Sess. 1 (1973) (*"Senate Report"* hereafter), (The *House Report* adopts almost verbatim the *Senate Report*. References to both are provided for the Court's convenience.); and *Senate Hearings* p. 113-14 (statement of John P. Frank).

essentially identical to 28 U.S.C. §455(a). The theme reflects historical concerns that judicial decisions in a democracy derive their principal sanction from public confidence in their impartiality.

The legislative history shows that the goal of Congress in amending Section 455 was to address issues of public perception of judicial impartiality. The juciciary depends more on public and litigant satisfaction for enforcement of its decisions than on force. Indeed, without general approval, it is doubtful that a strong, independent judiciary could survive. Congress intended to enact a general provision in Section §455(a) and then specify instances where it believed the public had specific, concrete concerns. Thus, Section §455(b) is merely a precise congressional catalogue of the most significant cases where the public harbors doubts about judicial partiality. It is certainly not always or even usually the case that personal knowledge (§455(b)(1)), prior service in a matter (§455(b)(2) and (3)), ownership of a financial interest, however small (§455(b)(4)), or relation to the third degree (§455(b)(5)) will in fact result in a biased decision. Many men and women can even overcome personal bias (§455(b)(1)) and still render objective decisions. But Congress felt in all these cases that reasonable public and litigant doubt might exist considering the complexity and size of modern society and prevailing views of human nature. When, after an adverse judgment, a losing party or a reasonable person learned that all along the judge was a trustee for a university which would benefit because of the decision, it is impossible for there not to be some, serious doubt. It is such doubt that Congress sought to remove.

Canon 3(C)(1) of the *A.B.A. Canons* provides that "a judge should disqualify himself" where "his impartiality might reasonably be questioned, *including* but not limited to instances where: ... (c) he knows that he, individually or as a fiduciary, has a financial interest in the subject matter ... or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." (emphasis added) Thus, under the *A.B.A. Canons*, upon which Section 455 was

based, having a defined interest was merely a specific instance where Congress recognized that a judge's impartiality might be questioned.[6]

While the language in Section 455 does not include the connecting phrase "including but not limited to" between subparagraph (a) and (b) as is found in Canon 3C(1), there is no reason to think that this difference is meaningful. The *House Report* states:

> Subsection (a) ... sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion." This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case.
>
> * * *
>
> Subsection (b) of the amended statute sets forth specific situations or circumstances when the judge must disqualify himself. These specific situations in subsection (b) are in addition to the general standards set forth in subsection (a). Thus, by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves.

6. *The Reporters Notes To Code of Judicial Conduct*, 60 (1973) regarding Canon 3C state that: "The disqualification section begins with a general standard that sets the policy for disqualification - that is 'a judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' The general standard is followed by a series of four specific disqualification standards that the committee determined to be of sufficient importance to be set forth in detail. Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."

House Report p. 5-6, and *Senate Report* p. 5.[7]

The relation of a judge's interest in the affairs of a university toward which he owes fiduciary obligations, and the "appearance of impropriety," is evident from the congressional decision to make the size of any financial interest irrelevant. Disqualification for holding a substantial interest (as Section 455 read prior to the 1974 amendments) addresses, albeit imprecisely, actual partiality in a judge. Holding a small interest can only address appearances.

Doubts as to constitutional interests existed where a judge had any direct financial interest.[8] Congress' solution was to require disqualification for any financial interest,[9] as had been the almost universal rule prior to 1948. *Senate Hearings*, p. 34 (testimony of John B. Frank) and Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947). Disqualification for such a small interest was seen as justified because it was impossible to know objectively the threshold of actual influence for all judges and no threshold avoids the appearance of impartiality absolute-

7. Similarly, see *Senate Hearings*, p. 80 (testimony of Judge Roger Traynor, Chairman of the ABA Special Committee on Standards of Judicial Conduct and former Chief Justice of the California Supreme Court); p. 93 and 99 (testimony of Professor E. Wayne Thode, Reporter for the ABA Special Committee on Standards of Judicial Conduct); and p. 30 (testimony of Senator Hollings).

8. *Senate Hearings*, p. 102 (testimony of Professor E. Wayne Thode).

9. *House Report*, p. 2 and *Senate Report*, p. 2.

ly.[10] And so it must be for all interests of a judge in parties affected by an outcome.

As Judge Traynor said:

> An independent and honorable judiciary is an indispensable condition of justice in our society. It is not enough that people have confidence in the sturdiness of judicial procedure. They must have utmost confidence in the integrity of their judges. The basic purpose of the Code of Judicial Conduct is to assure that judges will be worthy of that independence and deserving of that confidence.

Senate Hearings, p. 80.

2. *Concern For Public Perceptions of Judicial Impartiality Requires an Objective Standard of Knowledge.* One of the general purposes of Congress in amending 28 U.S.C. §455 was to establish an objective test of disqualification especially as to the appearance of impartiality.[11] The Fifth Circuit distinguished Section 455(b)(4) from Section 455(a) because Section 455(b)(4) requires that a judge "know" of his interest while no such explicit requirement appears in Section 455(a). *Health Services*, 796 F.2d at 802. Thus the court analyzed Judge Collins' constructive knowledge and its general impact on public perceptions of judicial impartiality. Believing that a reasonable person would believe the "judge has knowledge of facts that would give him an interest in the litigation" the court

10. See *Senate Hearings*, p. 15 and 16 (testimony of Senator Bayh); p. 26 (testimony of Senator Hollings); p. 46 (testimony of John B. Frank); and *Judicial Disqualification: Hearings on S.1064 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary*, 93d Cong., 2d Sess. 9 (1974) ("*House Hearings*" hereafter) (testimony of John B. Frank).

11. *House Report*, p. 5 and *Senate Report*, p. 5; *Senate Hearings*, p. 74; *Davis v. Xerox*, 811 F.2d 1293 (9th Cir. 1987); *Health Services*, 796 F.2d at 800; and *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1188 (1986).

concluded that "an appearance of partiality is created." *id.* Amicus contends that Section 455(b)(4) is merely a specific instance where Congress felt that a judge's impartiality might be questioned and as such is not conceptually separate from Section 455(a), and that the requirement of knowledge in Section 455(b)(4) is also satisfied by constructive or inferred knowledge.[12]

Petitioner focuses on the difficulty of a judge recusing because of constructive knowledge about facts of which the judge has no actual knowledge and the inability of constructive knowledge to actually impact a judicial result. See e.g., Brief for Petitioner at 9. Because of this, Petitioner concludes that judicial disqualification, at least under Section 455(a), operates prospectively only, i.e., only from the time the judge's attention is formally focused on the disqualifying facts. But this concern focuses exclusively on the evil of actual bias (conscious or unconscious). The implicit argument is that where a judge is consciously aware of an interest there is some likelihood that that awareness will in fact improperly influence the decision. This argument, which clearly has some merit, assumes that the sole evil to be avoided through Section 455 is actual bias. Yet personal bias is only one of the specific areas of conflicting interests set out in Section 455. 28 U.S.C. §455(b)(1). The legislative history, moreover, shows that at least equal consideration (Amicus would say predominate consideration) was given to assuring public confidence in the impartiality of the judiciary. If so, Petitioner's position must be found wanting.

At the House Hearings, John P. Frank[13] testified

12. The duty to be informed in Section 455(c) may *ipso facto* satisfy the knowledge requirement of Section 455(b)(4) as to direct financial interests.

13. John P. Frank is perhaps the most prolific expert on judicial disqualification in the United States. Because of his landmark article on judicial disqualification cited above, he testified as an expert witness at the request of Senator James Eastland in connection with the Haynsworth confirmation hearings. Additionally, he testified twice before the Senate subcommittee and once before the House subcommittee on amending Section 455. He also worked with Senator Bayh on his initial bill. See *Senate Hearings*, p. 32 and 113 and *House Hearings*, p. 8.

> In an effort to bring the statute into conformity [with the *A.B.A. Canons*], Senator Bayh, Senator Hollings and I worked out a bill which would do fundamentally two things. First, it would provide that a judge must disqualify if there was any interest. The great dramatic episode in the Haynsworth matter . . . was a case where a judge had a piddling bit of stock in some corporation. He got it pending a rehearing on a case that was clearly to be affirmed anyway, but the feeling was that whereas from where he sat it was nothing, from the standpoint of the injured workman, who was losing his all as a result of a decision, it just isn't going to look that way.[14]

Thus, the nomination was not criticized because of any actual bias. Judge Haynsworth's personal integrity was not questioned. It was concern for the perceptions of the losing litigants and the public at large that motivated at least part of the criticism of Judge Haynsworth and which was a consideration by the Congress in amending 28 U.S.C. §455.[15]

This concern for perceptions because of facts discovered post-judgment was also manifested in the testimony of Professor E. Wayne Thode, Reporter of the ABA Special Committee on Standards of Judicial Conduct. In explaining the committee's rejection of the so-called "blind trust," Professor Thode explained that the committee had rejected the concept for several reasons. He said:

14. *House Hearings*, p. 9. For further information on this incident, see Sen. Exec. Rep. 91-12, 91st Cong., 1st Sess. 11 (1969) (Report by Sen. Hruska for the majority of the Senate Committee on the Judiciary), 29 ff. (individual views of Senator Bayh), 43 ff. (individual views of Senator Griffin), and 50 (individual views of Senator Tidings).

15. Amicus does not argue that the mixed considerations influencing the Senate in the Haynsworth confirmation are determinative of the standards to be applied by this Court. Only to the extent those considerations influenced the development of 28 U.S.C. §455 are they offered here. As Justice Blackmun is quoted as stating at his confirmation hearings: "We must candidly recognize that the standards and times have changed and we are approaching things differently now." As quoted by John Frank. *House Hearings* at 9.

> Most important was the doubt that the public and litigants would believe that the trust was blind if after a decision the fact was disclosed that the judge had a substantial blind trust interest in the winning party in a proceeding before him.

Senate Hearings, p. 94.

Senator Griffin in his individual views quoted the following from a letter to him from Professor David Mellinkoff of the UCLA Law School dated Octobe: 20, 1969:

> In the U.S. District Court a jury awards an injured seaman $50 on a claim against Grace Lines - the claim which he thought was worth $30,000. Saddened, he takes his case to the U.S. Court of Appeals. It is not difficult to imagine the bitterness in the heart of this injured seaman when he learns that one of the judges to whom he appealed in vain, was even a small owner of the company that owns Grace Lines.
>
> By the standards of the market place, perhaps Judge Haynsworth's stock holding was trifling. But it looms large in the mind of the unhappy litigant searching to discover just what it was that tipped the scales of justice against him.
>
> To avoid such avoidable strains on the legal system, it has long been a maxim of the law that courts shall not only do justice - but they shall seem to do justice.

Sen. Exec. Rep. No. 91-12, 91st Cong., 1st Sess. 46 (1969) (individual views of Senator Griffin).

These views clearly represent the opinion that interests, which would not normally be thought sufficient to actually influence any but the most venal judge, are, however, sufficient to raise reasonable doubts in the public's mind as to the impartiality of the judiciary in such cases and thus to undermine confidence in that impartiality which is essential to a viable, independent juciciary. The Fifth Circuit rightly concluded that where:

> it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case, or because the judge is pure in heart and incorruptible.

Health Services, 796 F.2d at 802.

3. *An Objective Standard of Knowledge is Satisfied Here.* Determining "what a judge knows" for these purposes calls for some important distinctions that have not generally been made by the courts in disqualification cases. The briefs and opinions are heavily ladened with language of "actual knowledge" in contrast to "constructive knowledge". Although these terms are generally complete and useful, it is necessary to draw further distinctions in order to properly analyze the issues at hand.

The U.S. District Court in *NEC Corporation v. Intel Corporation*, 654 F.Supp. 1256, 1258 (N.D. Cal. 1987) seemed to require knowledge in the form of "conscious awareness of the connection between ... [the judge's] interest ... and the ... litigation." The requirement of a conscious awareness necessarily involves either the judge's own contemporaneous statement that he is aware or a factual inference drawn from the objective circumstances that the judge *was* aware. See e.g., *Davis v. Xerox*, 811 F.2d at 1296. Either a subjective acknowledgment by the judge that he knew or a factual inference that he knew provides a basis for a determination of "actual knowledge". 1A C.J.S. *Actual* p. 772 (1985). In contrast is "constructive knowledge" which is knowledge legally imputed to the judge from the circumstances regardless of actual, subjective knowledge. 16D C.J.S. *Constructive* p. 709 (1985). The distinction between knowledge inferred from the circumstances ("inferred knowledge" herein) and knowledge legally imputed ("constructive knowledge"), while clear in theory, is less clear in actual application. In both cases, an assessment of objective factors leads to or justifies the imposition of the legal consequences of

knowledge. In one case, the burden derives from a factual inference. In the other, it derives from a legal conclusion.

If, as argued by Petitioner, as accepted by the district court in *NEC Corp. v. Intel Corp.*, and as inferentially accepted by the Seventh Circuit in *United States v. Murphy*, an actual, present, mental awareness of the disqualifying facts is required, then a conclusion that the judge "should have known" but didn't, would result in a legal conclusion that such a judge was not disqualified. It would also, of necessity, fail to address at all concerns about the perceptions of the public, which, from the objective facts, might reasonably conclude that the judge knew. The Fifth Circuit has recognized this and sought to provide a remedy consistent with congressional goals.

The contrast between "inferred knowledge" and "constructive knowledge" also raises another practical dilemma for counsel. In virtually all of the cases cited or considered in the briefs, including the principal circuit cases, the conclusions are similar, e.g., the judge said that at pertinent times he did not mentally connect the facts which he knew at an earlier time with the case before him, but, from the facts that the judge acknowledged he possessed, he could have and thus should have made that connection.[16] In such cases, especially when the disqualifying facts are discovered post-judgment, counsel is in the awkward situation of not only moving to vacate the judgment because of the disqualifying interest overlooked by the judge, but also of being compelled by the circumstances to test the accuracy of the judge's statement that he had forgotten. While one would expect statements by members of the federal judiciary to be honest statements, it is too much to expect all such judges to be scrupulously accurate in light of the embarrassment of having overlooked a matter on which Congress has imposed a heavy duty. Moreover, counsel cannot be expected in the "run of the mill" case to engage in the type of searching interrogation of a sitting federal judge which is normally conducted in

16. Of course, when the judge recognizes the connection and raises the matter on his own motion, the problem of constructive knowledge will not arise.

attempting to test a witness' accuracy. After all, oral examination is not solely designed to test veracity - it is principally valuable in testing accuracy of memory, perception, and understanding. Where the issue is subjective conscious awareness of a judge at a particular moment, the *ipse dixit* of the judge is almost irrefutable as a practical matter. Only an objective standard, applied as the Fifth Circuit did in this case, avoids the collapse of the congressional scheme to protect the public's confidence in the impartiality of the judiciary.

The Fifth Circuit said that the "judge's forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality." *Health Services*, 796 F.2d at 802. This is so, because subjective forgetfulness is not something on which the public can be expected to reasonably rely with any degree of confidence. A judge charged with inferred or constructive knowledge undermines the public's perception of the impartiality of the judiciary - the very evil sought to be avoided by Congress.

There are obvious cases where a judge may in fact have an interest, but where a reasonable person would not believe that a judge knew of his interest. In *Union Carbide Corporation v. U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986), the district judge was handling an antitrust class action. The plaintiff class was composed of buyers of oxygen, nitrogen and argon. In February, 1983, the district judge married a man who owned stock in IBM and Kodak. Neither of these companies were named parties. In November, 1983, the class was certified.[17] As of October, 1984, the class notice list contained 172,001 names including IBM and Kodak. This list was maintained under seal in plaintiff's counsel's office. It had not been filed with the court as of the time the district judge ruled on the recusal motion. Although decided on other grounds, Amicus believes it is clear that, objectively considered, no reasonable

17. This fact, with others, is not mentioned in the Seventh Circuit opinion and is found in *In re Industrial Gas Antitrust Litigation*, No. 80-C-3479, slip op. (N.D. Ill., E. D. Sept. 1985) (available in Westlaw).

person would have concluded that the district judge *knew* her husband owned stock in a party to the litigation. She is clearly charged with knowledge that her husband owned stock in IBM and Kodak but information showing that IBM and Kodak were parties was not available to her. Similarly, in *Hodash v. Block Drug Co.*, 790 F.2d 880 (Fed. Cir.), *cert. denied*, 107 S.Ct. 106 (1986), a party moved to vacate an appellate decision because a corporate party to the appeal was acquired by a company in which the authoring judge's wife owned stock. The court properly held that there was no way the judge could have known about the acquisition and hence could not have known about his wife's interest.

In both *Union Carbide* and *Hodash*, the information which would reveal the relation of a known interest to pending litigation, and thus disqualify a judge, was not available to the judge. Knowing this fact, there is no basis on which a reasonable person would be concerned that the judge knew of his or her interest in that litigation. This is quite different from the situation in the instant case where the judge had once had actual knowledge but had forgotten. Forgetting leaves few, if any, objective clues.

Petitioner suggests that a constructive knowledge standard was originally adopted in the early drafts of the *A.B.A. Canons* but deliberately abandoned by the committee. Brief for Petitioner at 28. The cited Interim Report of the Special Committee on Standards of Judicial Conduct in fact used the phrase "know or should know" without comment. No explanation has been found for any change. Any inferrence that the change was intended to reject a constructive or inferred knowledge standard is rebutted by the lack of any explanation and Frank's own unchallenged testimony.

Frank was one of three key noncongressional witnesses before the Senate and House subcommittees (Judge Roger Traynor and Professor E. Wayne Thode being the other two). In the Senate Hearings in 1973 and 1974 (after the "should know" language had been dropped by the committee), Frank clearly

testified that a judge could not utterly neglect to find out what his interests were nor be excused for failing to know what he has.[18] While this is not dispositive of the issue (both Traynor and Thode were apparently aware of this testimony and took no exception), it clearly belies the notion that Frank thought the *A.B.A. Cannons* had expressly dropped a constructive knowledge test and indicates his own consistent, common sense expectation that judges are charged with knowing that which a reasonably prudent person in their position would be taken to know.

C. *Where There is a Reasonable Basis to Doubt a Judge's Impartiality, Judgments Entered by Such a Judge Should be Vacated.*

1. *Only Vacation of The Judgment and a New Trial Adequately Protect the Public's Expectation of Impartiality.* Petitioner argues that there are three possible rules relating to the remedy for a judge entering a judgment in spite of disqualification under 28 U.S.C. §455: (1) no retroactive relief in the absence of actual bias, (2) limit relief to cases where a motion to vacate is made while any appeal is still pending, and (3) limit post-judgment relief to cases of exceptional hardship. Brief for Petitioner at 9.

The Fifth Circuit has concluded that a judgment entered by a judge in circumstances where a judge's impartiality might be questioned on an objective basis must be vacated. *Health Services*, 796 F.2d at 802 and 803. The Seventh Circuit has concluded that disqualification under Section 455(a) for mere appearance of partiality operates only prospectively from the time of the motion. *United States v. Murphy*, 768 F.2d at 1539. The Ninth Circuit has concluded that "if the judge had knowledge within the meaning of the statute [Section 455(b)(4)] at the time he sat, all his rulings must be vacated." *Davis v. Xerox*, 811 F.2d at 1296.

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18. *Senate Hearings*, pp. 44 and 115 (testimony of John Frank).

As the Fifth Circuit has said: "[g]enerally, a judge who learns he has a financial or other interest in a case is only required to recuse himself from future proceedings." *Health Services,* 796 F.2d at 801. This is, of course, the way Congress hoped the statute would work. The duty to disqualify is that of the judge. If done optimally, disqualification will happen early and a new judge assigned. But this cannot happen when a judge overlooks, ignores, or forgets interests in the litigation of which he was previously aware.

Petitioner would simply say that it is harmless error if a judge fails in his duty to disqualify based on those facts available to him and of which he must once have been aware unless actual bias is shown. In all cases of judicial amnesia, Petitioner would say there is no remedy. Petitioner fails to say how this furthers the congressional interest in encouraging public confidence in judicial impartiality.

Amicus has argued above from the legislative history and text that 28 U.S.C. §455(b) identifes grounds to disqualify a judge because these grounds suggest partiality to the public and not because they always or usually result in biased decisions. Contrary views, not based on a full review of the legislative history, are ennunciated by the Seventh Circuit in, e.g., *United States v. Murphy,* 768 F.2d at 1539-41. If Amicus is correct, and holding interests as defined in Section 455(b)(4) results in disqualification in part because failure to do so undermines public and litigant confidence in the impartiality of the judiciary, then the remedies proposed by Petitioner and adopted in the Seventh Circuit are inadequate.

The statute contains no express remedy for this situation. The legislative history contains expressions running from reversal so long as the matter pends on appeal to collateral attack.[19] *Nowhere* does any part of the legislative history suggest that there is no remedy where a judge has overlooked, ignored or

19. *Senate Hearings,* p. 22 (testimony of Senator Bayh: indicating that the issue should be resolved within the appeal process based on timely objection); *Senate Hearings,* p. 36 (testimony of John B. Frank: "It is my view that if the judge turns out at the appeal stage to have had any interest, it is reversable error."); *House Hearings,* p. 16-17 (testimony of Judge Traynor: "That is whether a judge who sits in violation of these standards, whether the judgment that he enters is then subject to collateral attack (sic). It would be my judgment that where his disqualification was for financial interest, and he did not keep track of his interests or if he deliberately sat despite the financial interest, thinking that, say, five shares in General Motors was insubstantial, in violation of our more heroic provision that any interest, however small, would raise a serious question as to whether that judgment would be subject to collateral attack. [p. 16] ... I think there is strong support for the proposition that a judge who sits in violation of the financial interest disqualification would subject his judgment to collateral attack. [p. 17]"); *House Hearings,* p. 16-17 (testimony of John B. Frank: "... should he have a misunderstanding or misinterpretation of the matter, he is subject to review. He is subject to mandamus and he is subject to reversal. [p. 16] ... I would say, if I might supplement, it is subject to direct attack without question. The question of collateral attack, whether it reaches the point that it becomes, as the Judge has said, a denial of due process and is so void or whether it is mere error would require a set of qualifications that is beyond the scope of this bill or our commentary. [p. 17]"); and 120 Cong. Rec. 36,269 (1974) (statement of Representative Kastenmeier: "It may be noted that neither existing nor proposed §455 contains a sanction to enforce compliance. The section simply requires self-disqualification. The judge may be petitioned to disqualify himself. Failing this, he may be admonished. He may be reviewed, he may be mandamused and he may be reversed. The chief judge of the circuit may remove him from a particular case and, ultimately, a judge could be impeached and removed for failure to maintain 'good behavior'.")

forgotten a disqualifying interest and gone ahead and participated in a case.

The judicial function in cases like this must be to formulate and apply a remedy which will effectuate the goals set out in the statute. Amicus has argued that the principal goal of the 1974 amendments is to assure the public and losing litigants that judicial decisions will be or have been made on the merits and not affected by taint of the interests of individual judges. This taint need not be the conscious pursuit of interest[20] but will

20. In recusing himself on the ground of personal bias in *Public Utilities Commission v. Pollak,* 343 U.S. 451, 466 (1952), Justice Frankfurter said:

often be an inclination borne of an interest which tips "the scales of justice." Professor Mellinkoff, *supra.* at 14. To be adequate, the remedy must remove the grounds for public doubt about judicial impartiality. This doubt arises when reasonable people would infer "that a judge has knowledge of facts that would give him an interest in the litigation." *Health Services,* 796 F.2d at 802.

2. *The Motion to Vacate Was Timely.* The statute contains no express requirement of timeliness although one was suggested by the Department of Justice. *House Report,* p. 9. The Seventh Circuit has rejected a timeliness condition. *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977). Other circuits have not developed a clear standard. *United States v. Schreiber,* 599 F.2d 534 (3rd Cir.), *cert. denied,* 444 U.S. 843 (1979); *Oglala Sioux Tribe v. Homestake Min. Co.,* 722 F.2d 1407 (8th Cir. 1983), *reh'g denied,* (1984); *United States v. Conforte,* 624 F.2d 869 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980); *United States v. Slay,* 714 F.2d 1093 (11th Cir. 1983), *cert. denied,* 464 U.S. 1050 (1984); and *Delesdernier v. Porterie,* 666 F.2d 116 (5th Cir.), *cert. denied,* 459 U.S. 839 (1982) can each be read to stand for the proposition that when a party goes to decision at a time it is aware of facts allegedly disqualifying a judge, that party cannot later seek to vacate a decision of that judge because of such disqualifying factors. While this result does not easily square with Section 455(e) (which prohibits a judge from accepting a waiver of Section 455(b) grounds for disqualification), it is clearly a judicial

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"The fact is that, on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

application of ordinary principles of equitable estoppel.[21] Where a party, with knowledge of grounds on which to disqualify a judge, fails to object and permits the court and the other party to proceed, the silent party may equitably be estopped from later raising the point. A party ought not be permitted to await the decision while having information of factors disqualifying the judge. Even though a reasonable person might still have doubts about judicial impartiality in such a case, it is fair to let the full burden of those doubts fall on the party who silently permitted the matters to go forward — especially if there is some basis for believing the judge was not subjectively aware of the conflicting circumstances.

But here the findings indicate the knowledge of Judge Collins' trusteeship and the interest of Loyola in the outcome was not known to Respondent until post-judgment. The judge's financial disclosure reports may have disclosed Judge Collins' trusteeship (although there are no such findings), but the critical connection is between Judge Collins' interest in Loyola and Loyola's interest in the outcome. That would not appear in the financial disclosure reports. See e.g., *Delesdernier v. Porterie,* 666 F.2d at 123 n.4 ("A case in which the relevant information is not discovered until late in the litigation would present an entirely different question.") *In re International Business Machines Corp.,* 618 F.2d 923 (2nd Cir. 1980) similarly involved a party seeking recusal of a judge long after acquiring knowledge of the facts on which it based its allegations of personal bias. A petition for a writ of mandamus was filed to compel a judge to recuse himself. The recusal motion was filed over ten

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21. See e.g., *Local U. 7113 v. Allied Corp.,* 735 F.2d 121 (4th Cir. 1984), *cert. denied,* 105 S.Ct. 3527 (1985); *Fed. Dep. Ins. Corp. v. Harrison,* 735 F.2d 408 (11th Cir. 1984); and *Lovell Mfg., a Div. of Patterson-Erie Corp. v. Export-Import Bank of U.S.,* 777 F.2d 894 (3rd Cir. 1985). Equitable estoppel is distinguished from waiver in theory in that waiver results from an *intentional* relinquishment of a known right, *Baker v. Wingo,* 407 U.S. 514 (1972), whereas equitable estoppel arises from the detrimental reliance of another. See 31 C.J.S. *Estoppel* §61, p. 385 (1964).

years into an antitrust action and denied by the trial judge. The Second Circuit thoroughly discussed the merits of the petition and concluded that IBM had failed to show that the judge was personally biased. *id.* at 931. Having so decided, the writ should have been denied without more. Nevertheless, the court discussed timeliness. Concluding that a refusal to quash a subpoena had not suddenly triggered the "recognition" that the judge was biased, *id.* at 933, the court held that the motion was untimely. To the degree the case contains a holding on timeliness, it clearly fits the doctrine of equitable estoppel. The grounds actually relied on by IBM were not new. *id.* at 933 ("A major practical reason for the timeliness requirement is that the granting of a motion to recuse necessarily results in a waste of the judicial resources which have already been invested in the proceeding.")

In *United States* v. *Hines*, 696 F.2d 722 (10th Cir. 1982), *reh'g denied* (1983), the court found it was unnecessary to address the timeliness issue.

3. *The Value of Public and Litigant Confidence in the Impartiality of the Judiciary Outweighs the Value of Finality.* Finality of judgments furthers numerous separate goals. These goals include the settlement of controversies, the prevention of vexatious litigation, the efficient use of judicial resources, and the protection of the prestige of courts.[22] These values are not absolute and give way in the face of competing considerations.[23] These exceptions include certain types of jurisdictional defects, fraud, and mistake. No approved formula identifying all exceptions has been developed. But exceptions exist when competing values are judged to outweigh the values of finality. As this Court said in *Brown* v. *Felsen*, 442 U.S. 127, 132 (1979):

22. See Vestel, *Res Judicata/Preclusion*, pp. V-7-12 (1969); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4403 (1981); and *Montana* v. *U.S.*, 440 U.S. 147, [153-55] (1979).

23. See Vestel, *id.* pp. V-397-427 and 18 Wright, Miller & Cooper, *id.* §§4415 and 4426 (1981).

> Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.

In the present context, this Court must balance the interest in finality against the congressional policies stated in Section 455.[24]

Obviously, the repose of the previously prevailing party is not served by a new trial in which the outcome might not be different. But as the Fifth Circuit noted, Wright & Miller are of the opinion that

> [t]here should be no room in this context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner. The disqualification statutes are mandatory and failure of a judge to step aside if he is indeed disqualified under one of the three statutes always should require eversal.

13A Wright, Miller & Cooper, *Federal Practice & Procedures* §3553, p. 657 (1984), quoted in *Health Services*, 796 F.2d at 801. The error is not harmless to the interest in preserving public confidence in judicial impartiality.

The other finality values mentioned herein are not necessarily inconsistent with Amicus' argument. Prevention of vexatious litigation can be avoided by the application of equitable estoppel. A party with knowledge of the disqualifying factors should not be permitted to sit silent awaiting the outcome of the litigation before it raises the issue. On the other hand, however,

24. Moving for relief in the court rendering the judgment is the preferred course. 18 Wright, Miller & Cooper, *id.* §4415 at p. 129, n. 28 and *Restatement of Judgments (Second)* §78 and comment (A.L.I. 1982).

disqualifying factors, especially those peculiarly within the judge's own competence, are not the sort of factors that come to the surface through the ordinary course of litigation and discovery. Since disqualification is the judge's responsibility, parties ought not be charged with investigation of such factors in each case.

Judicial efficiency, moreover, is not served only by a single trial. It is also served by policies which minimize obstacles to voluntary compliance with judicial decisions. Policies permitting new trials in cases where post-judgment factors create an appearance of partiality also further judicial efficiency by encouraging public confidence in those decisions. Prestige of courts also is not only served by the enforcement of judgments but by evidence of judicial concern for public and litigant confidence in the fairness of judicial decisions.

Section 455 is aimed at assuring the public that judicial decisions will be rendered by judges who are above the common suspicions of partiality derived from interest or relation. Assuring an impartial appearance often means avoiding judicial decisions that would in fact be fair and impartial. Disqualification statutes go to the core of an effective judiciary. Without public confidence, the value of winning judgments is lessened. This confidence is not threatened by any single judge's decision. But it is eroded in time where no corrective action is taken when conflicting interests are discovered after judgment.

Amicus submits that when the interests in finality of judgments are weighed against the importance of public confidence in the fairness of judicial decision making, there can be no doubt that the balance must be struck in favor of protecting the appearance of judicial impartiality, as well as its reality, by redoing the thing once, but questionably, done. See e.g., *Kinnear-Weed Corporation v. Humble Oil Refining Company*, 403 F.2d 437, 439-40 (5th Cir. 1968). Judicial resources are valuable and not to be wasted. But rather than the inconsequential error suggested by Petitioner, few uses of judicial resources are as vital in our society as uses which reassure all that judges

will be and have been impartial. If a new trial is necessary to give that assurance, it is a proportionate price to pay. Petitioner's proposed remedies do nothing to reassure the losing litigant or the interested public that the judge's interest played no role in the outcome. The public will not have the information gleaned from a full hearing - the public will only know that after deciding that Liljeberg was entitled to prevail it came to light that the judge was on the board of trustees of a university which benefited from that decision.

IV. *CONCLUSION*

In conclusion, Amicus urges this Court to affirm the decision of the U.S. Court of Appeals in *Health Services Acquisition Corporation v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986).

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CERTIFICATE OF SERVICE

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